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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CLIFFORD LAUNIUS,

Petitioner,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF DES PLAINES, ILLINOIS; A. C. WILSON, Chairman, HERMAN HERZOG and WILLIAM J. CONNOLLY, Members of the Board of Fire and Police Commissioners; and JOSEPH KOZENCZAK, Chief of Police of the City of Des Plaines, Illinois,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under due process, is a police officer's duty to protect the lives of his family subordinated to his duty to government?

II. Under equal protection, within a para-military organization, are the following two disciplinary violations sufficiently related to justify imposing equal punishment for both: absent without leave (AWOL) failure to remain at a police post, and failure to report for duty?

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The Petitioner respectfully requests this Court to issue a writ of certiorari to the Supreme Court of Illinois to review that Court's decision and opinion entered on September 24, 1992, with a subsequent denial of a petition for rehearing entered on November 30, 1992. (App. B1).

OPINIONS BELOW

On August 3, 1989, the Circuit Court of Cook County, Illinois, affirmed the judgment of the Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, for terminating the Petitioner as a police officer for the City of Des Plaines, Illinois, because the Petitioner had disobeyed an order of a superior officer. This superior officer had refused to grant the Petitioner's request to leave his police post to attend the needs of his wife and two minor children, one age eight months and another age five years, whose lives were jeopardized by the flooding of the residential area wherein the Petitioner and his family resided. (App. C1-C6).

Subsequently thereafter, the Illinois Appellate Court, First District, in an Appellate opinion entitled *Launius v. Board of Fire and Police Commissioners of the City of Des Plaines, et al.*, 211 Ill.App.3d 545 (1991), (App. D1-D26), in a split opinion, reversed the decision of the Circuit Court affirming the Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, dismissal of the Petitioner as a police officer for the City of Des Plaines, Illinois, on the grounds that there was no existing *declared* state of emergency when the Petitioner abandoned his post, and that another officer's refusal to obey an order to report for duty without being punished for such failure was another factor mitigating against the dismissal of the Petitioner.

On September 24, 1992, the Illinois Supreme Court reversed the Illinois Appellate Court's decision and affirmed the decision of the Circuit Court of Cook County, Illinois, affirming the Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, dismissal of the Petitioner, 151 Ill.2d 419 (1992). (App. A1-A26).

In its reversal, the Illinois Supreme Court held that, although there was no *declared state of emergency*, nevertheless the Illinois Supreme Court found that an emergency existed, with the further observation that the Petitioner was not under a continuous duress which prevented him from returning to the Police Department of the City of Des Plaines, Illinois, after he found his family was not in jeopardy.

Furthermore, the Illinois Supreme Court did not consider another police officer's disobedience of an order to report for duty as *sufficiently related* to petitioner's disobedience to remain at his post for the application of equal punishment.

JURISDICTION

1. The decision of the Supreme Court of Illinois was entered on September 24, 1992.

2. The federal question of the Petitioner's inalienable right to protect his family was argued extensively before the Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, the Circuit Court of Cook County, Illinois, the Illinois Appellate Court, First District, and the Illinois Supreme Court, based upon duress with the unequal punishment being noted relative to another police officer who disobeyed an order to report for duty for which disobedience there was no punishment.

3. The Petition for Writ of Certiorari was filed less than ninety (90) days from the denial of the Petition for Rehearing on November 30, 1992.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In the early morning hours of August 14, 1987, petitioner left his wife and two children, ages eight months and five years, at their townhouse in Wheeling, Illinois, and drove to the police station to begin the 7 a.m. to 3 p.m. second watch. He was aware enroute to the station that an excessive amount of rain had fallen overnight and that a number of roadways were impassable due to standing water. On his 6:45 a.m. arrival, petitioner was assigned to the complaint desk and switchboard, where he was required to transfer to the dispatcher telephone calls from citizens requesting information and assistance. (App. D2).

Between 7:30 and 7:45 a.m., officers assigned to the desk and those on the street were advised of the implementation of the City's emergency traffic plan, which requires traffic accident victims to report accidents at the police station. At 8:25 a.m., the mayor ordered the Chief of Police to the Emergency Command Center, a coordinating center for department heads. (App. D2).

At approximately 7:30 a.m., petitioner, upon noticing the heavy rainfall, telephoned his wife and requested that she check their basement for water. His wife reported no water in the basement, but stated that the lake across the street had overflowed its banks and flooded the street. Between 8 a.m. and 8:15 a.m., petitioner's wife telephoned petitioner to inform him that water was at that time seeping into the basement and that the lake's overflow had progressed to the front lawn and garage. Petitioner again contacted his wife between 9 a.m. and 9:10 a.m., at which time his wife excitedly reported the continuance of the spread of water toward the house and the continuance of water accumulation in the basement. (App. D2-D3).

Petitioner then informed Lieutenant Ronald K. Diehl that flooding was becoming a problem at his home and that, as a result, he might have to leave. Diehl refused to give petitioner permission to leave. When petitioner approached Diehl a second time, around 9:25 a.m., Diehl again denied petitioner's request to leave. Petitioner replied that his home, wife, and children were more important than "this place," and then stated that he would wait awhile. (App. D3).

At approximately 9:45 a.m., when petitioner telephoned his wife, she stated in a hysterical voice that water was at the doorstep and that water was pouring in through the window wells. Between 9:45 a.m. and 10 a.m., petitioner changed from his uniform into civilian clothes and left the police department without receiving permission to do so. (App. D3).

At the time of petitioner's departure, five other police officers, including two sergeants and Lieutenant Diehl, were stationed at the desk area where the three-line switchboard was located. Petitioner was observed by the Chief of Police, Diehl and Captain Clark as he left the station and heard them mention his name in a conversation amongst themselves. Petitioner's position was replaced within a half an hour from his departure, and no incoming telephone calls were left unanswered. (App. D3).

The evidence at the hearing conflicted regarding the details surrounding petitioner's departure. Petitioner testified that, when he first approached Diehl regarding the problem, Diehl stated that his wife should "start bailing." Diehl denied making such a remark. Petitioner also stated that Diehl did not respond when he spoke with him a third time and requested that he speak to the Chief of Police on his behalf. Diehl denied speaking with petitioner following the second conversation. (App. D3-D4).

At the hearing, Diehl described the situation at the department the morning of petitioner's departure. The department was taking incoming telephone calls, but could not make any outgoing calls. The officers were barely able to keep up with the flood-related inquiries. No squad cars were available to answer calls, and officers could not respond to all the power and alarms going off in the City. Because they could not call in additional manpower, officers on the street drove to the homes of officers living in the City to tell them to report to the station. The two sergeants manning the desk area at the time described the situation as "very hectic" and "very busy." (App. D4).

When petitioner arrived at the entrance to his subdivision after the 45-minute, 8-mile drive to his townhouse development, he could not proceed further. Although the rain and the spread of water had ceased by this time, petitioner had to walk the quarter mile to his home in water levels he estimated as ranging from ankle depth to chest high. When petitioner reached his home, he first checked his family's safety, then checked his basement, which sustained minimal damage due to the four to six inches of water, and shortly after 11 a.m. checked on his neighbors. (App. D4).

Witnesses at the hearing further described the conditions at the townhouse development that day. Petitioner's wife, who was five feet two inches in height, estimated the water in the street outside her home to be waist high at the time she spoke to petitioner that morning. She testified that cars were unable to enter or exit the development until the next day. Petitioner's neighbor stated that the water level, estimated to be two-and-a-half to three feet high in the street at 9 a.m., did not subside until late afternoon. Petitioner estimated that the water level on the street near his townhouse, as depicted in photo-

graphs taken by him sometime after 2 p.m., varied from one foot to two feet. (App. D4-D5).

Petitioner spent the remainder of the afternoon until dusk filling and hauling sandbags around his and his neighbors' homes because more rain was expected and a flash-flood warning was in effect until 2 p.m. Petitioner could not make outgoing calls from 11 a.m. until the early evening. At approximately 9:30 p.m., Officer Timothy Veit telephoned petitioner at his home to inform him of the 12-hour shifts at the station. Petitioner telephoned the watch commander, Lieutenant Storm, at 9:50 p.m. to advise him of his availability for duty. Storm told petitioner that petitioner was put on emergency suspension with pay. (App. D5).

At the hearing, the parties presented evidence regarding the existence of emergency conditions and petitioner's knowledge of such at the time of his departure. Petitioner testified that he left a non-emergency switchboard and that he did not receive any emergency calls on that date. He was never informed of the existence of an emergency and was not informed of 12-hour shifts, which would indicate emergency conditions, until Veit's telephone call at 9:30 p.m. Petitioner was aware that, sometime late in the afternoon of August 14, an emergency command center for the *Wheeling* Police Department and Public Works Department was established at the clubhouse near his townhouse. In petitioner's opinion, there was no emergency at the time he left the police station. (App. D5).

Sergeant Neal explained that the switchboard, not the area, is classified as "non-emergency" because emergency calls are generally taken in another area, although emergency calls quite often come into the switchboard. Diehl testified that the City was in a state of emergency on the morning of August 14, but admitted that a formal

declaration of emergency was never announced and that he never informed petitioner of the existence of a state of emergency. The Chief of Police testified that he gave the order to implement the 12-hour shifts, but it was not implemented until Captain Sturlini's arrival at the station at approximately 10:30 or 11 a.m. (App. D5-D6).

After the incident, the respondents filed charges, among which, in paragraph 5 of the "Second Amended Statement of Charges," wherein the Chief of Police alleged "[t]hat on August 14, 1987, a state of emergency existed in the City of Des Plaines due to the extreme amount of rain which caused widespread flooding throughout the City of Des Plaines." Although the Board did not expressly find that petitioner left his post during a state of emergency, it noted, in paragraph 21, that petitioner "acknowledged that as a result of his conduct *in abandoning his post on August 14, 1987, during a city-wide emergency,* his fellow officers can no longer rely on him to carry out his assigned duties and to always be there when they need him." In paragraph 20 of its discharge order, the Board also states that petitioner left his assigned post on a day when "approximately nine (9) inches of rain fell on the City, *resulting in a city-wide emergency.*" In finding petitioner guilty of "Unbecoming Conduct" in paragraph 9 of the order, the Board further notes that petitioner's conduct brought the Department into disrepute "*at the very time when officers were needed to handle a major disaster* in the City of Des Plaines." (App. D10-D11).

During the course of the administrative hearing, there was evidence that Officer Czyzewski, who was off duty on August 14, 1987, was contacted by a superior between 8:40 and 8:50 a.m. and ordered to report to duty, despite his repeated protests that his street was impassable. Czyzewski refused by responding with an obscenity. Czyzew-

ski was given a four-day suspension for insubordination, and no charges were brought for his failure to report. The circuit court found that the actions of the two police officers were markedly different in that petitioner was punished for leaving his assigned post, while Czyzewski was suspended for swearing at a superior who had insisted that Czyzewski report to work even though he was off-duty and "hemmed in" by water. (App. D18).

The Illinois Appellate Court found little significance in the fact that Czyzewski was off-duty at the time. The necessity of police officers to report to duty on command is no less important to the efficiency of the department than the necessity of police officers to remain on assigned duty. The circuit court's reliance on testimony that Czyzewski was "hemmed in" by water is inconsistent with its reliance on its finding that petitioner should have returned to the station after reaching his home and family under the flooding conditions. Petitioner's conduct here is not so markedly different from Czyzewski's conduct to warrant such a more severe sanction. Both officers disobeyed orders from their superiors and did not work on assigned shifts. (App. D18-D19).

REASONS FOR GRANTING THE WRIT

I.

THE DECLARATION OF INDEPENDENCE STATES "WE HOLD THESE TRUTHS TO BE SELF-EVIDENT, THAT ALL MEN ARE CREATED EQUAL, THAT THEY ARE ENDOWED BY THEIR CREATOR WITH CERTAIN INALIENABLE RIGHTS, THAT AMONG THESE ARE LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS."

The pronouncement as found in the Declaration of Independence in 1776 is embodied in the Fifth and Fourteenth Amendments to the United States Constitution, wherein it is provided that no person shall be deprived of his inalienable right to protect his own life or the lives of his family.

Nevertheless, in its slip opinion decision (App. A25), the Court states:

> A police officer does not have the option of performing his duties when he wishes. Plaintiff admitted that as a police officer, it was his primary and sworn duty to protect the lives and property of the citizens of Des Plaines. The board found, *inter alia*, that plaintiff abandoned his post, that he "refused to perform his duties as a police officer," that he "demonstrated a substantial shortcoming which render[ed] continuance in employment in some way detrimental to the discipline and efficiency of the Police Department"; and consequently, the board ordered that plaintiff be discharged from his position as a police officer. This decision was neither unrelated to the needs of the service nor arbitrary and unreasonable.

The Court's decision has been interpreted as standing for the proposition that one's duty to government is more paramount than one's duty to family, as is evidenced by a Chicago Tribune headline, dated September 25, 1992,

which reads "Duty or home? Court says cop chose wrong." (App. E13-E16).

Because of the above stated issue whether one's duty to government is more paramount than one's duty to family, this Supreme Court of the United States is being asked to grant this Writ of Certiorari to address this vital question, particularly when this issue has received nationwide publicity, with features in *People* magazine, *USA Today* newspaper, and the television program *Donahue*. (App. E14).

As previously stated in this Writ of Certiorari, the Declaration of Independence and the Fifth and the Fourteenth Amendments to the United States Constitution recognizing the importance of protecting one's life and lives of one's family can be traced to the tenets of the natural law as is analyzed by J.B. Schneewind, *Moral Philosophy from Montaigne to Kant*, An Anthology, Volume I, wherein on page 7, the author states:

> Thomas's doctrine of natural law is at heart a doctrine not of natural rights but of natural responsibilities. "The good of the part is for the good of the whole," Thomas asserted, "hence everything, by its natural appetite and love, loves its own proper good because of the common good of the whole universe, which is God." The laws of nature show us what we are to do as our proper work for the common good, and other people should allow us to do those things. In this way we might have rights arising from our responsibilities in the cosmic venture. But the responsibilities come before the rights, and both belong to us only as members of a community. Only the laws of nature, and not rights as such, can place any restraints on the laws that humans can pass.

Based upon the above observation, "hence everything, by its natural appetite and love, loves its own proper good

because of the common good of the whole universe, which is God," in the same textbook, referring to the philosopher Christian Wolff, at pages 345-346, the following is observed:

> Only when a man does not have it in his power to do something to which the law of nature obligates him, when it is in our power, are we bound to help him. . . .

In this matter, pursuant to St. Thomas Aquinas and Christian Wolff, the Petitioner had the responsibility to attend the needs of his family because of his natural appetite and love for his own proper good; but he did not have it in his power to fulfill that responsibility unless he disobeyed the order to remain at his post.

The philosophical analysis of St. Thomas Aquinas and Christian Wolff of the natural law that the human being has the responsibility to protect the lives of his family with the accompanying power to fulfill that obligation has been recognized as a mitigating circumstance against dismissal in military decisions involving AWOL.

In *Ronald K. Roberts*, 457-19-1308 (1982), a U.S. Military Court of Appeals found that a Navy corpsman could be absent without authorization if he believed his wife was being threatened with serious bodily injury.

The *Roberts* Military Court of Appeals relied upon *United States v. Palus*, 13 M.J. 179 (C.M.A. 1982), which holds at page 180 that:

> Duress is raised as a defense where an accused acts under a reasonably grounded fear of immediate death or serious bodily injury, either to himself or to his immediate family, if he does not commit the act. *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976); *United States v. Pinkston*, 18 U.S.C.M.A. 261, 39 C.M.R. 261

> (1969). See also para. 216f, Manual for Courts-Martial, United States, 1969 (Revised edition).

In its slip opinion (App. A25), the Illinois Supreme Court acknowledges that the Petitioner was unaware that a shift change, indicative of an emergency, had occurred; and that the Petitioner could not be contacted by telephone to report for emergency duty, since the Petitioner's telephone was inoperable. Yet, the Illinois Supreme Court holds that, when the Petitioner arrived at his residence at or about 11:00 a.m., and discovered that his family was not in danger, the Petitioner should have returned to his police department, particularly when:

> Plaintiff testified that he followed the weather reports after leaving the station and that "there was a flash flood warning * * * in effect for 2:00 p.m. that afternoon. More rain was expected."

Because of the above factor, the Illinois Supreme Court has determined that the Petitioner had a duty to the City of Des Plaines, Illinois, to return to his post, and did not have a duty to remain with his family, even though the lives of his family were still being threatened by additional flooding per a flash flood warning in effect.

In philosophical circles, this United States Supreme Court can take judicial notice that lawful means do not justify an unlawful end or vice versa; in this instance, the Illinois Supreme Court chose a lawful means in the re-weighing of evidence standard to justify its unlawful end, affirming the arbitrary, capricious, and unreasonable dismissal of the Petitioner, by characterizing the Illinois Appellate Court's analysis of the facts and evidence (App. D11-D12), as re-weighing of the evidence and substituting its judgment of a less harsh punishment than discharge of the Petitioner:

While the record supports a finding that the City experienced severe weather conditions and at some point invoked emergency plans on August 14, 1990, a finding that plaintiff was aware of a state of emergency or that he abandoned his post during a state of emergency is not supported by the evidence. When plaintiff left the station between 9:45 and 10 a.m., in the presence of his superiors, he was not informed of a declaration of emergency. The 12-hour shifts, testified to by defendants' expert as being indicative of emergency conditions, were not implemented until after his departure. In addition, irrespective of the classification of the switchboard, plaintiff testified that he received no emergency calls before he left the switchboard and that five other persons were present in the area who could have operated the three-phone switchboard.

We do not believe that plaintiff's knowledge of the heavy rainfall and flooding and of the department's implementation of an emergency traffic plan at the time he left his post is sufficient evidence to find a state of emergency or to impute knowledge of such to plaintiff. Nor do we believe that such findings can be upheld from plaintiff's affirmative responses to opposing counsel's inquiry of whether he breached his sworn duty when he "abandoned [his] post on August 14 during a city-wide emergency" and to the statement that his fellow police officers can no longer rely upon him as a result of his conduct "in abandoning [his] post on August 14 during a city-wide emergency." These multifaceted questions contain the undisputed fact that plaintiff left his assigned post without permission, and plaintiff's clear position throughout the hearings was that emergency conditions did not exist at the time of his departure.

Accordingly, insofar as the Board found that a state of emergency existed on plaintiff's departure or that plaintiff was aware of the existence of a state of

> emergency, those findings are against the manifest weight of the evidence.

For purposes of emphasis, the analysis of the facts by the *Launius* Appellate Court was not re-weighing of the evidence, but determining that there was no substantial evidence supporting a finding of guilt based upon the following factors:

> When the Petitioner left his post in disobedience of an order, there was no declared state of emergency;
>
> The Petitioner honestly and reasonably believed that the lives of his family were in danger, constituting duress;
>
> This duress remained until the afternoon, based upon weather reports indicating a flash flood warning lasting until 2:00 p.m.;
>
> The Petitioner was unaware of the changes of the shifts from three shifts to two shifts, indicating a state of emergency, and therefore was under the honest and reasonable, though mistaken, belief that his shift ended at 3:00 p.m.;
>
> At 2:00 p.m., when the danger seemed to be past, since the return trip would take 45 minutes, which would place him back at the station approximately when he believed his shift ended, the Petitioner chose to remain at his residence.

Further, a lesser punishment was justified under due process of protecting one's family, pursuant to previously cited military law, which appropriately applies, in this instance, since the Petitioner was a member of a paramilitary organization, a police department. (App. E10, E17).

Under appropriate military law, *United States v. Graham*, 3 M.J. 962 (NCMR 1977), at page 965:

> A mistake of fact may be a defense to the general intent offense of unauthorized absence if it is both honest and reasonable.

In summary, because of the continuous duress that the Petitioner had experienced for the concern of the welfare of his family, and because of the honest mistake that the Petitioner had with reference to an alleged emergency and a requirement to return to duty for an extended shift, the punishment of dismissal is certainly arbitrary, capricious, and unreasonable.

Lastly, in its slip opinion (App. A18-A19), to justify further the Petitioner's dismissal, the Illinois Supreme Court discounts the prior Appellate Court opinion of *Christenson v. Board of Fire and Police Commissioners*, 83 Ill.App. 3d 472 (1980), wherein the Appellate Court reversed the dismissal of a police officer who left his post during duty hours for the purpose of attending the needs of his horses.

In the Illinois Supreme Court opinion, the Court states that "it appears that the appellate court reweighed the evidence and found that the police officer's conduct was not substantial misconduct justifying dismissal."

In choosing the re-weighing of the evidence approach to diminish the relevancy of the application of the *Christenson* decision, the Illinois Supreme Court attempts to solidify its legal position that the Petitioner's due process right to protect his family is subordinate to his duty to government.

By utilizing the above approach, the Illinois Supreme Court has circumvented natural law, that the Illinois Appellate Court, First District, decision implicitly recognized, at D17:

> Plaintiff's concern for his family's welfare is even a greater mitigating circumstance than the concern for property in *Christenson*. . . .

II.

THE COURT'S DECISION DENIES EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION TO THE PETITIONER WHEN IT DOES NOT CONSIDER THE PETITIONER'S AWOL FOR LEAVING HIS POST IN DISOBEDIENCE OF AN ORDER AS SUFFICIENTLY RELATED TO ANOTHER POLICE OFFICER'S AWOL FAILING TO REPORT FOR DUTY IN DISOBEDIENCE OF AN ORDER.

In addressing the issue of equal punishment, the Illinois Supreme Court, in the slip opinion (App. A23), states that the Petitioner's AWOL as compared to the other police officer's AWOL was not *sufficiently related* to invoke the application of equal punishment.

In commenting upon the Illinois Supreme Court decision, relative to the issue of punishment, the former police chief of the City of Des Plaines, Illinois, Police Department, Joseph Kozenczak, observed in the *Des Plaines Journal*, dated September 25, 1992, at E20:

> "It was a very difficult decision I had to make, but I felt it was justified," added Kozenczak. "You can't have a police officer go AWOL during an emergency. It's unheard of."

At the same time, the Board of Fire and Police Commissioners attorney, Burton Odelson, in the same newspaper (App. E17), is quoted as follows:

> "A police force is paramilitary which means they have to follow orders. If he (Launius) was in the military he would have been court marshalled (sic)."

Interestingly and ironically, as reflected in the Petition for Rehearing, at E10, Chief Kozenczak was asked if Czyzewski's conduct would have constituted a court martial, at C865-866:

Q. Czyzewski, Czyzewski, I pronounce it the way it should be pronounced. All right. Now, on Czyzewski, you said he called and said he couldn't come in, right?
A. No, he was called by the sergeant in the process of calling officers back.
Q. All right. And he said—what did he say to the sergeant?
A. "Fuck you, I am not coming in."
Q. Fuck you?
A. Yes.
Q. That's a disobedience of an order, isn't it, fuck you?
A. It's more of an insubordination in the sense of the language he used.
Q. We were both in the military and you say this is a para-military organization, right?
A. Yes.
Q. If I said to you in the military, "Fuck you, Captain," what would you say?
A. You're court martialed.
Q. You bet, court martialed. Now, are you a paramilitary organization or not here?
A. Sure, we are.

It is indeed incongruous for the Board of Fire and Police Commissioners of the City of Des Plaines, through its former police chief, Joseph Kozenczak, and its legal counsel, Burton Odelson, to maintain that Launius' punishment of discharge was appropriate on the basis that, in the military, he would have been court martialed, while Czyzewski's conduct, which would have merited a court martial in the military, resulted in no punishment for the AWOL incident, and only a four day punishment for insubordination.

Consequently, the observations of former chief Kozenczak and Burton Odelson, legal counsel of the Board of Fire and Police Commissioners of the City of Des Plaines,

Illinois, confirm the Illinois Appellate Court's position that the cases were sufficiently related, contrary to the Supreme Court's decision that the factual situations were "not sufficiently related," (App. A23), when the Appellate Court succinctly states at App. D19:

> Plaintiff's (Petitioner's) conduct here is not so markedly different from Czyzewski's conduct to warrant such a more severe sanction. Both officers disobeyed orders from their superiors and did not work on assigned shifts.

The Illinois Supreme Court acknowledged Czyzewski's inability to report to duty because of surrounding flood water, a physical obstruction. Yet, astonishingly, the Court refused to acknowledge the Petitioner's physical obstruction of being surrounded by flood waters, accompanied by the mental obstruction of duress: in his perception that the lives of his wife and children were in jeopardy, in his initial response to his wife's frantic call for help, and with his perception being further amplified by the threat of an impending flash-flood. Significantly, this mental obstruction of duress was a factor absent in Police Officer Czyzewski's AWOL.

Because the Illinois Supreme Court chose to consider the flash-flood warning as a compelling consideration for the Petitioner to return to work rather than to protect the lives of his family, slip opinion (App. A25), the Court's decision punished the Petitioner for exercising his inalienable right to protect his family, contrary to the dictates of the natural law:

> "hence everything, by its natural appetite and love, loves its own proper good because of the common good of the whole universe, which is God."

As embodied in the Declaration of Independence:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."

And as reaffirmed in the Fifth and Fourteenth Amendments of the United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONCLUSION

For the above stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Opinion of the Supreme Court of Illinois
Filed September 24, 1992

Docket Nos. 72070, 72075 cons.—Agenda 18—January 1992.

CLIFFORD LAUNIUS, Appellee, v. THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF DES PLAINES *et al.*, Appellants.

JUSTICE MORAN delivered the opinion of the court:

Plaintiff, Clifford Launius, was discharged from his job as a police officer with the Des Plaines police department (the department). He filed a complaint for administrative review in the circuit court of Cook County against the defendants, the board of fire and police commissioners of the City of Des Plaines (the board) and Joseph Kozenczak, chief of police of the City of Des Plaines. The court affirmed the board's order and plaintiff appealed. The appellate court, with one justice dissenting, reversed and remanded the matter to the board so that it could consider a more appropriate sanction. (211 Ill. App. 3d 545.) This court allowed defendants' petitions for leave to appeal (134 Ill. 2d R. 315(a)).

The City of Chicago and the Illinois Municipal League filed briefs, as *amici curiae*, in support of defendants. Three lodges of the Fraternal Order of Police—Illinois State Lodge, Lodge Number 7, and Lodge Number 41—filed briefs, as *amici curiae*, in support of plaintiff.

The two issues presented for review are whether: (1) the board's findings were against the manifest weight of the evidence, and (2) the appellate court erred in overturning the board's decision to discharge plaintiff.

Plaintiff's discharge was primarily a consequence of his leaving work on August 14, 1987. On this particular day, plaintiff was scheduled to work from 7 a.m. until 3 p.m. He reported for work on time and was assigned to work the complaint desk located on the first floor of the police station. In this assignment, he was responsible for handling walk-in complaints from citizens and answering telephones. While at work that morning, he spoke with his wife four different times on the telephone.

At around 7:30 a.m., plaintiff telephoned his wife at home because, during the preceding hour, he "noticed that it was raining very, very hard outside." He asked her to check the basement of their town house, which she did, and she then told him that there was no seepage. However, she informed him that water from a nearby lake had overflowed and flooded the street in front of their home. Plaintiff spoke to his wife a second time between 8 a.m. and 8:15 a.m. During this telephone call, she informed him that water was seeping into the basement and it had spread onto their front lawn and to the garage. At around 9 a.m., plaintiff spoke to his wife a third time and, in an excited tone, she informed him that the basement was accumulating water and that the water continued to flow towards their house. At 9:45 a.m., plaintiff spoke to his wife a fourth time. He testified that during this last telephone call, his wife was hysterical because water had reached the doorstep of their home and it was coming through the window wells.

After the third telephone conversation with his wife, plaintiff informed Lieutenant Ronald Diehl that he might have to leave his post because water was entering his basement, flooding was becoming a problem, and lake water was approaching his home. Lieutenant Diehl denied his request. He approached Diehl a second time at

approximately 9:25 a.m. and asked for relief, explaining that there is a time when the safety and welfare of one's family comes before a job. Plaintiff testified that Diehl told him that it was a decision that plaintiff had to make and the lieutenant walked away. Shortly thereafter, he asked Diehl if he could request permission from the chief of police, but Diehl turned away without saying anything.

At approximately 9:45 a.m., he was concerned about the safety of his wife and two young daughters, who were five years and six months old at the time. He believed his wife and children were in jeopardy so he went to the locker room and changed into his civilian clothes. Plaintiff then exited the building and drove his car the eight-mile distance between the police station and his Wheeling town house.

According to plaintiff, the travel time between his home and the station is normally a 15-minute commute, but his trip back to his town house "took approximately 45 minutes to an hour." He parked his car at the entrance to the subdivision in which his town house was located because of the amount of water that had accumulated in the streets within the subdivision. From there, he walked the quarter mile to his town house. He saw that the street located in front of his home was filled with water to a level of about three to four feet high. He entered his home and, after checking on his family, proceeded down to the basement. He testified that his basement had "four to six inches of water" and he described the damage to his personal property as minimal. After safeguarding some personal belongings, plaintiff, from approximately 11 a.m. until dusk, helped his neighbors and hauled sandbags.

At 9:30 p.m., he received a telephone call at his home from Officer Timothy Veit, who informed him that 12-hour shifts were in effect at the police station. Twenty minutes later, plaintiff telephoned Lieutenant John Storm to make him aware that he was available if needed. Storm replied that plaintiff was put on emergency-paid suspension.

Lieutenant Diehl's testimony before the board was generally as follows: that he was the watch commander on August 14, 1987, and his shift ran from 7 a.m. until 3 p.m.; that at approximately 9:45 a.m., plaintiff requested permission to go home because of the weather conditions and Diehl told him "no"; that plaintiff then replied "that his home, his wife, and kids [were] more important than this place," but that he would wait awhile; that at about 10 a.m., plaintiff left his post and exited the police station; that he was never told by the plaintiff that plaintiff's family was in danger; and that plaintiff never asked to speak to the police chief, Joseph Kozenczak.

Chief Kozenczak testified also, and his testimony was generally as follows: that he was standing outside the station with two other officers at around 10 a.m. on August 14, 1987, when he saw plaintiff; that Lieutenant Diehl told him that plaintiff had "just walked off the job"; that he suspended plaintiff with pay and filed charges seeking his dismissal; that he thought plaintiff's conduct would undermine the authority of the command staff to control the rank and file; and that because he left his post, plaintiff's position was filled by another officer who could have been used on the street.

Evidence was also presented relative to a June 17, 1987, incident involving plaintiff and Louis Sheffield, a motorist. Sheffield described the incident as follows: on

June 17, 1987, at approximately 6 a.m., he was driving to work; he was pulled over by the plaintiff for a speeding violation; he exited his car in an effort to talk to plaintiff, but plaintiff would not listen to him, and he was told by plaintiff to return to his car; plaintiff approached the driver's side of Sheffield's automobile and, as he did so, Sheffield told plaintiff that he thought his attitude was lousy; after hearing this, plaintiff became "hyper, excited or agitated"; that he took the ticket from plaintiff, threw it on the dashboard and said, "Just give me the f*** ticket"; plaintiff then grabbed him around the neck and pulled his wrist down towards his elbow; plaintiff then remarked, "Don't you ever snatch anything out of anybody's hand, especially mine"; and afterwards, he went to the police station and made a complaint of what had happened.

Plaintiff's testimony of what happened differed from Sheffield's in that he described the incident as follows: that as he was about to hand the ticket to Sheffield through the driver's side window, Sheffield "made a fist and batted [his] hand out of the car"; and that he grabbed Sheffield's left arm and extended it out through the door to avoid being struck by Sheffield.

Plaintiff was charged with violating the following department rules: (1) Rule 310.02 in that his acts constituted unbecoming conduct; (2) Rule 310.30 in that he failed to carry out his duty as a police officer; (3) Rule 310.16 in that he failed to remain on duty; (4) Rule 310.34 in that he failed to obey the rules and regulations of the department; (5) Rule 320.30 in that he failed to remain on duty until he was relieved by another department employee; (6) Rule 320.50, in that he was absent from duty; (7) Rule 370.45 in that he used unnecessary

physical force when issuing a traffic citation; (8) Rule 380.54 in that he failed to remain courteous and calm when he issued a traffic citation to a member of the public; and (9) Rule 310.24 in that he deliberately disobeyed a lawful order to remain at his post.

The board conducted a hearing on the charges, and it found plaintiff guilty of violating the following rules: Rule 310.02, entitled "Unbecoming Conduct"; Rule 310.30, entitled "Performance Of Duty"; Rule 310.16, entitled "Duty Responsibilities"; Rule 310.34, entitled "Obedience To Laws And Regulations"; Rule 320.30, entitled "Relief"; Rule 320.50, entitled "Absence From Duty"; Rule 380.54, entitled "Conduct Toward The Public"; and Rule 310.24, entitled "Insubordination." Particularly because of its findings relative to the August 14 incident, the board ordered that plaintiff be discharged from his position as a police officer.

Plaintiff then filed a complaint for administrative review in the circuit court of Cook County, and the court confirmed the board's decision, concluding that the board's decision "was neither contrary to the manifest weight of the evidence nor contrary to law." Plaintiff appealed, and a divided appellate court held: (1) that the following findings of the board were against the manifest weight of the evidence—that plaintiff either knew of, or left his post during a state of emergency; that plaintiff's conduct brought the department into disrepute; that plaintiff failed to remain calm when Sheffield was issued a traffic ticket; and (2) that the board's decision to discharge plaintiff was unrelated to the needs of the department, arbitrary, and unreasonable.

The first issue presented for review is whether the board's findings were against the manifest weight of the evidence. Defendants contend that the record, especially

plaintiff's admissions, amply support the board's findings. Plaintiff maintains that the appellate court decision is correct, because the board's finding that a state of emergency existed at the time plaintiff left the police station was contrary to the manifest weight of the evidence.

Because the board is an administrative agency, its findings of fact on review "shall be held to be prima facie true and correct." (Ill. Rev. Stat. 1985, ch. 110, par. 3—110.) When reviewing the findings of an administrative agency, a court should inquire whether the findings are against the manifest weight of the evidence. It is not the court's function to resolve factual inconsistencies, nor is it the court's duty to weigh the evidence and then determine where the preponderance of the evidence lies. *Collura v. Board of Police Commissioners* (1986), 113 Ill. 2d 361, 372-73.

The appellate court first stated that "the Board did not expressly find that plaintiff left his post during a state of emergency." (211 Ill. App. 3d at 554.) Yet, later in its opinion, the court concluded that the board's findings were against the manifest weight of the evidence "insofar *as the Board found* that a state of emergency existed on plaintiff's departure or that plaintiff was aware of the existence of a state of emergency." (Emphasis added.) (211 Ill. App. 3d at 555.) After reviewing the discharge order of the board, together with the record of the hearing, this court concludes that the board did not find that plaintiff left his post during a "state of emergency."

Nowhere in its written discharge order does the board even refer to a "state of emergency." Instead, the board found that plaintiff violated seven rules of the de-

partment when he left his post on August 14, 1987, "*the day* that the City of Des Plaines experienced the worst flooding in its history." (Emphasis added.) The chief of police testified: that the City of Des Plaines had over nine inches of rain; that it had suffered some of the worst flooding in the city's history; that approximately 7,000 homes and over 200 businesses were impacted by the flooding; and that about half of the city's streets "were totally blocked off." A report which summarized the impact of the flood on the City of Des Plaines was admitted into evidence and offered, according to counsel for the police chief, "just to show the extent of the flooding that took place in the city and how many buildings, homes and streets were affected." The board simply described the day on which the incident occurred and did not find, as the appellate court erroneously determined, that plaintiff left his post at a time when a state of emergency existed.

To the extent that the board's discharge order may be read such that it considered the circumstances surrounding plaintiff's departure to be in the nature of an emergency, ample evidence was presented before the board in this regard. As Justice Campbell correctly stated in his dissenting opinion, "At most, the evidence conflicted regarding the existence of emergency conditions and plaintiff's knowledge of such at the time of his departure." 211 Ill. App. 3d at 562 (Campbell, J., dissenting).

Plaintiff admitted that while driving to work he listened to a news station on the radio and learned that "we had standing water in the roadway" and that "[s]ome roads were impassible." The very reason plaintiff first contacted his wife from work was because he

"noticed that it was raining very, very hard outside." Based on his conversations with his wife, plaintiff learned that the City of Des Plaines was having flood-related problems. Plaintiff admitted that while he worked the desk that morning, he answered questions from citizens who called the department seeking information relative to the flooding in the City of Des Plaines. Plaintiff testified that 90% of the calls that came into the desk area that morning concerned traffic redirection and, given that fact, he "imagine[d]" this was because there was standing water in the roadway.

Police Officer Ronald Roepke, who was assigned to work the desk area along with plaintiff, described the desk area between the hours of 7 a.m. and 10 a.m. as "very hectic" and stated that he and plaintiff "were extremely busy." Police Officer John Engeriser was assigned to desk duty at 9:10 a.m., and he testified that "[h]undreds" of calls were coming into the station at around 10 a.m. Sergeant Neil also described the police station as being "extremely busy" and stated that there were "a lot of phone calls [coming] in" and "many citizens [came] to the desk area window asking directions, asking what to do, and also filing accident reports." Lieutenant Diehl testified that there were four police officers answering phone calls at approximately 9 a.m. and that "[t]he [phone] lines were constantly being stacked or backed up." An expert witness, Glenn Murphy, opined that plaintiff's position on August 14, 1987, was an emergency position.

Plaintiff himself admitted that he had abandoned his post during a city-wide emergency. The board noted that plaintiff "acknowledged that as a result of his conduct in abandoning his post on August 14, 1987, during a city-wide emergency, his fellow officers can no longer rely

upon him to carry out his assigned duties and to always be there when they need him." Plaintiff's testimony in this regard was as follows:

> "Q. [Mr. Lucansky]: And it is your sworn duty to protect the lives and property of the citizens of Des Plaines, is it not?
>
> A. [Clifford Launius]: Yes, it is.
>
> Q. And when you abandoned your post on August 14 during a city-wide emergency, you breached that sworn duty, did you not?
>
> A. Yes, I did.
>
> • • •
>
> Q. Officer Launius, as a result of your conduct in abandoning your post on August 14 during a city-wide emergency, your fellow police officers can no longer rely upon you to carry out your assigned duties and to always be there when they need you—
>
> • • •
>
> THE WITNESS: That's correct."

The appellate court discounted the above testimony on the basis that the questions were "multifaceted." However, plaintiff was called to the stand by counsel for the chief of police and plaintiff testified as if he were under cross-examination. (See Ill. Rev. Stat. 1985, ch. 110, par. 2—1102 ("Examination of adverse party or agent").) The general rule is that witnesses cannot be asked leading questions *except* on cross-examination. The very nature of leading questions is that they are suggestive of "the answer by putting into the witness' mind the words or thought of the answer." *People v. Cobb* (1989), 186 Ill. App. 3d 898, 915, citing *People v. Schladweiler* (1925), 315 Ill. 553, 556.

On the other hand, the evidence before the board which showed a lack of emergency was generally as follows: plaintiff described the switchboard at the complaint

desk as a nonemergency switchboard; and he identified a position description and a general order of the department which described the switchboard as nonemergency. Plaintiff testified: that he received no emergency calls while he worked the desk that morning; that no emergency occurred while he was on duty; that he was never told of an emergency, nor was there a declaration of emergency; that he was unaware of flooding, but what information he had only pertained to impassible roadways; that he did not learn that an emergency-traffic plan had been put into effect until he heard it at the hearing; that he was not aware of police officers' becoming emergency personnel; that at the time he left the station he was unaware that the department instituted 12-hour shifts; that he was also unaware of "any manpower call-backs"; that he asked for permission to leave because there were six officers at the desk and that "none of them were totally and completely busy"; and that it was his opinion that there was plenty of manpower to replace him. Also, there was evidence presented that a fellow officer filled plaintiff's post within a half hour after plaintiff left the station.

Plaintiff directs our attention to the testimony of the following police officers, which he maintains further shows that no emergency-type conditions existed around the time plaintiff left the station: that Police Officer William Prim testified that he was not contacted at his part-time job on August 14, 1987, even though Lieutenant Diehl knew he was there; that Police Officer Juan Tovar testified that he was permitted to leave work prior to the end of his shift on August 15, 1987, so that he could attend a wedding; that Police Officer Gerald Loconsole was on vacation on August 14, 1987, and told to leave the station because he would have to stay if a superior

officer saw him; and that Police Officer Richard Czyzewski was at home on a scheduled day off on August 14, 1987, and that he refused to report to work when told to do so by Sergeant Neil. As was said earlier in this opinion, the evidence which tended to show whether emergency conditions were present within the desk area or the department in general conflicted at best.

The appellate court also found that other findings of the board were unsupported by the evidence. The board found that plaintiff left his post after having been denied permission to leave; that after leaving the station, he did not return to duty; and that he remained out of contact with the department for a 12-hour period. The board found that such conduct "brought the Department into disrepute *** at the very time when officers were needed to handle a major disaster in the City of Des Plaines."

The appellate court determined that the only evidence which could justify the board's disrepute finding was supplied through the testimony of Glenn Murphy, an expert in police management, morale and discipline. Murphy testified that plaintiff's conduct undermined the command structure of the department and it also adversely affected the department's relationship with the community. However, the appellate court determined that Murphy's testimony could not support the board's finding "[b]ecause the expert's opinion was premised upon the circumstances of an officer leaving an assigned post *during a state of emergency*—circumstances found *** to be unsupported by the evidence." (Emphasis in original.) 211 Ill. App. 3d at 555.

Counsel for the chief of police, on numerous occasions, asked for Murphy's opinion while stating in his question that plaintiff had left "his assigned post during

a state of emergency." Plaintiff's counsel objected only once, contending that the question should *include* the "extenuating circumstances relative to [plaintiff's] situation," and not because the question made reference to a state of emergency. The questions posed to Murphy cannot now be considered erroneous, because a proper objection was not made at the hearing. (See, *e.g.*, *Smith v. Illinois Valley Ice Cream Co.* (1959), 20 Ill. App. 2d 312, 321 (contention that certain facts within a hypothetical question were not in evidence "was waived by failure to point out the elements improperly included in the question").) Moreover, there were even instances in the record where plaintiff's attorney, during Murphy's cross-examination, asked for Murphy's opinion based on the assumption that an emergency situation existed within the department. Nevertheless, Murphy's testimony does support the board's finding because, as stated earlier in this opinion, there was evidence before the board that emergency conditions existed at the time plaintiff was in violation of the department's rules and regulations.

The appellate court also held that the evidence did not support the board's finding that plaintiff violated Rule 380.54, entitled "Conduct Toward The Public." The board found "that when issuing a traffic citation to Louis B. Sheffield, [plaintiff] failed to remain courteous and orderly, and failed to remain calm regardless of provocation to do otherwise." The chief of police contends in his brief that the evidence presented at the hearing would fully support the board's finding. We agree.

Rule 380.54 reads as follows:

> "*CONDUCT TOWARD THE PUBLIC* Members and employees shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly,

> avoiding harsh, violent, profane or insolent language and shall always attempt to remain calm, regardless of provocation to do otherwise. Upon request, they are required to supply their name, rank or star number in a gentlemanly manner. They shall attend to requests from the public quickly and accurately, avoiding unnecessary referral to other parts of the Department." (Emphasis in original.)

The testimony of the motorist, Sheffield, was in relevant part as follows: that plaintiff would not listen to his reason for speeding; that he told plaintiff he had a bad attitude; that plaintiff "started getting all this [*sic*] hyper, excited or agitated feeling"; and that plaintiff remarked, "I have a bad attitude?"

Plaintiff's version was different, in that he testified as follows: that he stopped Sheffield's car; that Sheffield asked why he was stopped; that plaintiff told him he would explain once Sheffield handed him his license; that after he was given the license, he told Sheffield he was speeding; that Sheffield then used vulgar language; that as he went to hand Sheffield a traffic ticket, Sheffield used his fist and batted plaintiff's hand out of the car; that plaintiff then used reasonable force to defend himself; that plaintiff was at all times calm and orderly; and that he did not use any profane language toward Sheffield.

Again, as did the conflicting evidence relative to the conditions at the time plaintiff abandoned his post, the evidence as to whether plaintiff was courteous, orderly, and calm during the traffic stop conflicted also. The board chose to believe Sheffield, and thus, its finding that plaintiff violated Rule 380.54 was not against the manifest weight of the evidence.

The second issue presented for review is whether the appellate court erred in overturning the board's decision to discharge plaintiff. This court must determine whether the board's findings of fact supported its conclusion that cause existed for plaintiff's discharge. "Cause" has been defined as " 'some substantial shortcoming which renders [the employee's] continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his [discharge].' " (*Walsh v. Board of Fire & Police Commissioners* (1983), 96 Ill. 2d 101, 105, quoting *Fantozzi v. Board of Fire & Police Commissioners* (1963), 27 Ill. 2d 357, 360.) The board's "cause" finding is to be respected by this court and it should be "overturned only if it is arbitrary and unreasonable or unrelated to the requirements of the service." *Walsh*, 96 Ill. 2d at 105.

The appellate court found that the board's discharge decision was not related to the requirements of the service because plaintiff's conduct did "not reflect a flaw in integrity or character" in that: he "did not deceive his superior officers," but instead told them he was leaving; he left the station when five other officers were at the desk area and a state of emergency was not in effect; he was "concern[ed] for the safety of his wife and two small children"; and he was involved in a single incident of misconduct. (211 Ill. App. 3d at 558-59.) The aforementioned points relied upon by the appellate court are not really probative of whether the board's action was related to the needs of the service, but are more in the nature of mitigating factors.

This court stated in *Sutton v. Civil Service Comm'n* (1982), 91 Ill. 2d 404, 411:

> "The question, though, is not whether this court would decide upon a more lenient sanction than discharge were it to determine initially what discipline would be appropriate. Nor is it whether this court would conclude in view of the mitigating circumstances *** that a different penalty would be more appropriate. The question is whether, in view of the circumstances presented, this court can say that the [board], in opting for discharge, acted unreasonably or arbitrarily or selected a type of discipline unrelated to the needs of the service."

Certainly fundamental to the needs of the service is that when a police officer reports for duty, is assigned to a post, and is then refused permission to leave that post he ought to obey the order of his superior officer and remain there. See, *e.g.*, *Martin v. Matthys* (1986), 149 Ill. App. 3d 800, 808 ("A rule permitting each officer to subjectively determine whether he believes an order to be lawful and reasonable would destroy the discipline necessarily inherent in a paramilitary organization such as the police department. [Citations.] A police officer does not have the prerogative of actively disobeying an order from a superior while seeking a determination as to the validity of that order. Such a practice would thwart the authority and respect which is the foundation of the effective and efficient operation of a police force"); 16A E. McQuillan, Municipal Corporations §45.66, at 397-98 (3d ed. 1992) ("an employee's good-faith disagreement with the employer's opinion or judgment underlying a reasonable order does not justify the employee's refusal to follow the order").

The importance of this fundamental obligation was exemplified in a passage of plaintiff's testimony:

"Q. Officer Launius, as a patrol officer, it is not your prerogative to determine whether there is or isn't available manpower to replace an officer at his assigned post, is it?

A. No, it's not.

Q. That prerogative belongs to the Chief and to his command officers, does it not?

A. Yes, it does.

Q. As a patrol officer, you were not even aware of all the information about the August 14 flood, were you?

A. No, I was not.

Q. And as a patrol officer, you [did] not know the demands upon the Department and what police officers are needed and where they were needed on August 14, did you?

A. No, I did not.

Q. And as a police officer, you did not know the strength of the force on August 14, did you?

A. No, I did not.

Q. Only the Chief of Police and his command officers knew all of those facts; isn't that correct?

A. That would be correct.

Q. And Officer Launius, you [did] not have the facts to know whether there was plenty of manpower to replace you on August 14, did you?

A. No, I did not.

Q. And as a patrol officer, it is not your position or within your power to make such a decision, is it?

A. No, it is not.

Q. Officer Launius, if every police officer on the force could decide in his own mind whether he was needed or not and whether he should stay on his post or go home, there would be a total chaos on [*sic*] the Department, would there not?

A. Yes, that's correct."

Plaintiff considers it instructive that military courts have held that an unauthorized absence can be mitigated

by duress. "Duress is raised as a defense where an accused acts under a reasonably grounded fear of immediate death or serious bodily injury *** to his immediate family, if he does not commit the act." (*United States v. Palus* (1982), 13 M.J. 179, 180.) Whether plaintiff was under duress at the time he left the station is a question of fact. This court is not the finder of fact, the board was. "[A] reviewing court is not to reweigh the evidence or make an independent determination of the facts." *Murdy v. Edgar* (1984), 103 Ill. 2d 384, 391.

Assuming, *arguendo*, that the board recognized duress as a defense, it cannot seriously be contended that plaintiff was under duress for the entire period in which he was absent from his post. Before he reached his town house, the rain had stopped and the water in front of his home was no longer rising. When he did arrive at his home, the first thing he did was check on the safety of his wife and children. From there, he went to his basement where he saw that he only had "four to six inches of water." If plaintiff was under duress that morning, it had to be at an end by 11 a.m., because by this time, plaintiff had checked out his home and he had proceeded to help out his neighbors.

Furthermore, plaintiff asks this court to adopt the reasoning of the appellate court where it found that the circumstances surrounding his discharge were analogous to *Christenson v. Board of Fire & Police Commissioners* (1980), 83 Ill. App. 3d 472, and *Humbles v. Board of Fire & Police Commissioners* (1977), 53 Ill. App. 3d 731. (211 Ill. App. 3d at 558.) After reviewing these two cases, we find them to be distinguishable from the facts in the instant case.

In *Christenson*, a police officer was discharged for using a police vehicle for a two-hour period to attend to an emergency situation that confronted his horses. It appears that the appellate court reweighed the evidence and found that the police officer's conduct was not substantial misconduct justifying dismissal. The court placed particular emphasis on the following mitigating factors: he put someone else "in charge rather than abandon his responsibilities"; he attempted to remain in contact with the department while he was gone from his post; there was no emergency that necessitated his presence in the city; and "he worked an hour after his shift to assure things ran smoothly." (*Christenson*, 83 Ill. App. 3d at 477.) Whereas in plaintiff's case, the board found: that he "abandoned" his post after "having been denied permission to leave" and did not remain "on duty until he was properly relieved by another member of the Police Department"; that he left the station and "was out of contact with the Police Department for approximately 12 hours"; that during the period of plaintiff's absence, "officers were needed to handle a major disaster in the City of Des Plaines"; and that plaintiff "left his assigned post and the Des Plaines Police Station at about 10:00 A.M., three hours after his duty shift began [and he] did not return to duty."

In *Humbles*, a police officer was discharged for disobeying a superior officer because he did not wait at the station as he was told, but instead, he left the station and traveled to the county courthouse on a personal matter which related to his wife's divorce action. The appellate court found that the police officer's conduct did not give the police board cause to discharge him. One significant reason which the appellate court relied upon

was the fact that "there [was] no indication that Humbles' action had the effect of lowering police morale or undermining public confidence in the *** police department." (*Humbles*, 53 Ill. App. 3d at 735.) Conversely, the board here found that plaintiff's "conduct brought the Department into disrepute and reflected discredit upon [him], at the very time when officers were needed to handle a major disaster in the City of Des Plaines." The board also noted "[t]hat the evidence indicated that the [plaintiff] was the sole member of the Des Plaines Police Department who while on duty abandoned his duty post, left the City of Des Plaines without permission and in defiance of an order of his superior officer" and that plaintiff "acknowledged that as a result of his conduct in abandoning his post *** during a city-wide emergency, his fellow officers can no longer rely upon him to carry out his assigned duties and to always be there when they need him."

Not only did the appellate court find the board's decision to be unrelated to the needs of the department, it also found the decision to be arbitrary and unreasonable in light of a less severe disciplinary penalty imposed upon another police officer for misconduct that arose during the same period of flooding. (211 Ill. App. 3d at 559.) Defendants contend that the other officer, Richard Czyzewski, engaged in misconduct that did not compare to the misconduct of the plaintiff. Plaintiff maintains that he and Czyzewski engaged in similar misconduct, but Czyzewski received only a four-day suspension; thus, he asks this court to find the board's decision to be arbitrary and unreasonable.

The circumstances surrounding Czyzewski's disciplinary matter were presented before the board. Czy-

zewski's testimony was generally as follows: on August 14, 1987, he was not scheduled to work because the 14th happened to be one of his "normal three days" off; while at home at approximately 8:50 a.m., he returned Sergeant Neil's telephone call and Neil ordered him to report to work; he told Neil that he could not get out of his driveway and that the street was impassible because it was filled with water; he lost his temper and told Neil, "F*** you. I'm not coming in"; Neil hung up and about 20 or 30 minutes later he received a message to contact the police chief; he then called the chief and the chief told him to report to his office at 9 a.m. on Monday; he reported on Monday and a police captain advised him that the chief was recommending a five-day suspension for insubordination; he met with the chief later in the week, and the chief listened to his explanation of the incident; he told the chief that he "technically *** didn't get any water" but "was probably the only one *** for blocks around that didn't get any"; he helped a next-door neighbor because "her husband was out of town"; he also told the chief that "he had reports that the street was starting to collapse," but, as it turned out, "a large section of the parkway was actually collapsing, it wasn't the street"; and after the meeting, the chief took the matter under advisement and reduced the five-day suspension to a four-day suspension.

Chief Kozenczak testified as to the circumstances which caused him to discipline Czyzewski: Neil contacted Czyzewski, who was off duty and at home, and Neil explained the department's emergency situation; Czyzewski was unable to leave his home "because of extensive flooding in front of his house"; Czyzewski told Neil, "F*** you, I am not coming in"; he spoke to Czyzewski

that morning and Czyzewski told him he was "flooded in" and that he could not get out of his house if he wanted to; he then told Czyzewski that he would see him on Monday; he suspended him for four days because of "the language that he used towards his supervisor; he did not suspend him for failing to report to work on the 14th because he determined that Czyzewski "couldn't come into work even if he wanted to"; and he did not think that he treated the plaintiff and Czyzewski unequally because he thought "[t]here [was] a big difference between the two of them"—plaintiff engaged in "direct insubordination," he was on duty, he left his post, and he walked out of the station.

An administrative tribunal's finding of "cause" for discharge may be considered arbitrary and unreasonable when it is compared to the discipline imposed in a completely related case. *Wilson v. Board of Fire & Police Commissioners* (1990), 205 Ill. App. 3d 984, 992; see also *Basketfield v. Daniel* (1979), 71 Ill. App. 3d 877, 881 (on remand, police board should consider evidence as to discipline imposed on another member of the department who was involved in the same incident because it "would be relevant and useful to the board in exercising its discretion and insuring consistency in disciplinary action"); 2 F. Cooper, State Administrative Law 762 (1965) (administrative actions "in which the epithet *capricious* may properly be applied are those where an agency has given different treatment to two respondents in identical circumstances" (emphasis in original)).

However, cause for discharge can be found regardless of whether other employees have been disciplined differently. *Lyles v. Department of Transportation* (1989), 183 Ill. App. 3d 901, 911-12 (court did not find the discharge

of an employee to be arbitrary where facts surrounding the charges of other employees precluded meaningful comparison to the discharge at issue); *Sheehan v. Board of Fire & Police Commissioners* (1987), 158 Ill. App. 3d 275, 290 n.15 ("record does not permit an informed comparison between the conduct for which plaintiff was discharged and the conduct for which other officers were merely suspended"); *Jones v. Civil Service Comm'n* (1979), 80 Ill. App. 3d 74, 75 ("plaintiff offered an unsubstantiated conclusion that criminal conduct on the part of white police officers resulted in the imposition of apparently minimal disciplinary sanctions").

In *McCaffery v. Civil Service Board of Chicago Park District* (1955), 7 Ill. App. 2d 164, a patrolman was discharged for accepting a bribe as an inducement to void an arrest. The patrolman contended that his discharge was arbitrary because the arresting officers and the sergeant in charge received only suspensions. The court rejected this argument, finding that "[t]he Board in determining the extent of the penalty inflicted upon the respondents had the right to take into consideration the evidence that the [patrolman] took the initiative and was primarily instrumental in working out the scheme by which the prisoners would be liberated providing certain monetary payments were made." (*McCaffery*, 7 Ill. App. 2d at 177.) After considering *McCaffery* together with the other authority outlined above, this court finds that the facts in plaintiff's case, as compared to the available facts in Czyzewski's case, are not sufficiently related to render the board's discharge decision arbitrary and unreasonable.

While it is true that Czyzewski, in a profane manner, disobeyed an order to report for duty, the chief testified

that he did not discipline him for not reporting because the chief determined that the amount of water around his home would have not allowed him to "come into work even if he wanted to." On the other hand, the circumstances surrounding the misconduct of the plaintiff were different: plaintiff was at his post; he was denied permission to leave, but he left anyway, working only three hours of his shift; he was out of contact with the department for approximately a 12-hour period; and he "did not return to duty." Plaintiff did not stay at his post and carry out his duties as he was ordered to do because he thought his family was in jeopardy. However, the board noted that "[a]t no time did [plaintiff] or his wife contact the Wheeling Police or Fire Departments for assistance."

Moreover, plaintiff was not unable to return to the station after he reached his home. The record shows that after plaintiff left the station, he drove home and parked his car on the outside of his town house development. He then walked a quarter mile to his home through water which varied from chest high, to ankle high "near *** the opening of [the] development." In his brief, plaintiff maintains that "his failure to report for more than 12 hours was due to the fact that *he was never informed* that there was an institution of 12-hours shifts, indicative of an emergency." (Emphasis added.) But, plaintiff could simply have returned to the station to complete the shift to which he was assigned. Plaintiff had checked out the safety of his family by 11 a.m., and his shift ran until 3 p.m. Had he driven the eight-mile distance from his town house back to the station, he would have been available to complete his shift and he also would have been made aware of the 12-hour shifts.

Part of the reason plaintiff was not informed about the 12-hour shifts was because plaintiff did not communicate with the department until *a police officer contacted him* about a shift change. It was only after this phone call that he contacted the department at approximately 9:50 p.m. to notify the watch commander that he was available for duty. However, the plaintiff testified that *his phone* would not permit him to make outgoing calls between 11 a.m. and 5 p.m. and that he believed he was able to make outgoing calls from his phone "sometime after dark in the early evening."

Plaintiff maintains that a flash-flood warning caused him to remain at his home. Plaintiff testified that he followed the weather reports after leaving the station and that "there was a flash flood warning *** in effect for 2:00 p.m. that afternoon. More rain was expected." This warning does not compare with the obstruction which prevented Czyzewski from reporting to duty. If anything, this flash-flood warning should have induced plaintiff to return to duty.

A police officer does not have the option of performing his duties when he wishes. Plaintiff admitted that as a police officer, it was his primary and sworn duty to protect the lives and property of the citizens of Des Plaines. The board found, *inter alia*, that plaintiff abandoned his post, that he "refused to perform his duties as a police officer," that he "demonstrated a substantial shortcoming which render[ed] continuance in employment in some way detrimental to the discipline and efficiency of the Police Department"; and consequently, the board ordered that plaintiff be discharged from his position as a police officer. This decision was neither unrelated to the needs of the service nor arbitrary and unreasonable.

For the foregoing reasons, the judgment of the appellate court is reversed, and the judgment of the circuit court of Cook County is affirmed.

Appellate court reversed;
circuit court affirmed.

APPENDIX B

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

November 30, 1992

Mr. Stanley H. Jakala
Attorney at Law
3219 S. Maple Ave.
Berwyn, IL 60402

Nos. 72070, 72075 Cons.—

Clifford Launius, appellee, v. The Board of Fire & Police Commissioners of the City of Des Plaines et al., etc., appellants. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 10, 1992.

APPENDIX C

[Filed August 30, 1989]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

No. 88 CH 5826

CLIFFORD LAUNIUS,

Plaintiff,

v.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF DES PLAINES, ILLINOIS, A.C. WILSON, CHAIRMAN, HERMAN HERZOG and WILLIAM J. CONNOLLY, MEMBERS OF BOARD OF FIRE AND POLICE COMMISSIONERS, and JOSEPH KOZENCZAK, CHIEF OF POLICE OF THE CITY OF DES PLAINES, ILLINOIS,

Defendants.

DECISION

This case came on to be heard on the complaint of Clifford Launius for Administrative Review of the decision of the Board of Fire and Police Commissioners of the City of Des Plaines to terminate Launius' employment. Having read the briefs and exhibits and heard the arguments of counsel, the Court affirms the decision of the Board, finding it to be neither contrary to the manifest weight of the evidence nor contrary to law.

1.

In reviewing the Board's decision, the Court's discretion is severely limited. The Court can find that the Board's decision is contrary to the manifest weight of the evidence "[o]nly when after viewing the evidence in the light most favorable to the administrative agency (the Board), the Court determines that no rational trier of fact could have agreed with the agency's (the Board's) decision because an opposite conclusion is clearly evident." *Bultos v. Board of Fire and Police Commissioners*, 171 Ill. App. 3d 189, 524 N.E.2d 1172 (1st Dist., 1988).

The facts before the Board do not support an opposite conclusion, but clearly support the Board's conclusion that Launius violated the Rules and Regulations of the Des Plaines Police Department as charged. In fact, Launius does not dispute that, contrary to orders, he left his post to return to his home in Wheeling during the flooding, and remained out of contact with the Des Plaines Police Department. (Tr. vol. 4 p. 1330-31). Launius argues that his action was justified because he faced extenuating circumstances in that his wife and children were at home alone threatened by the floods. However, Launius' offered excuse does not negate the fact that he left his post, contrary to orders. Thus, the Court must find that the Board's decision that Launius' conduct violated the Rules and Regulations of the Police Department is not against the manifest weight of the evidence.

Further, the Court finds the Board's decision regarding the June 17, 1987 traffic stop incident is not against the manifest weight of the evidence or contrary to law.

2.

The Court next turns to Launius' argument that the Board's sanction of discharge was too harsh under the extenuating circumstances of his case. The Court finds that under the particular circumstances in Launius' case the discharge of Launius was not too harsh. Before a police officer may be discharged for cause, his conduct must constitute some substantial shortcoming which renders his continuance in office detrimental to the discipline and efficiency of the service, and which the law and sound public opinion recognize as good reason for the officer to no longer hold his position. *Onesto v. Board of City of Chicago*, 92 Ill. App.3d 183, 416 N.E.2d at 16. Disobeying a lawful order, and abandoning one's post is cause for discharge. *Coursey v. Board*, 90 Ill. App.2d 31, 234 N.E.2d 339 (1st Dist., 1967). In the instant case, Launius disobeyed the lawful order of his supervisor and abandoned his post. In addition, though he argues extenuating circumstances for leaving his post, Launius did not remain in contact with the department, and did not even try to return once he had seen to the safety of his house and family, even though he was aware of the flooding threat to Des Plaines. The Board could reasonably conclude that these are serious actions, thus discharge was not too harsh, or arbitrary, capricious and unreasonable. *Christenson v. Board of Fire and Police Commissioners*, 83 Ill. App.3d 472, 404 N.E.2d 339 (1st Dist., 1980).

Launius further argues that the Board acted arbitrarily, capriciously and unreasonably, because the facts in *Christenson*, supra, were similar to the facts here, and Christenson was not discharged. The facts in *Christenson* were materially different. First, Christenson, a police officer, did not disobey an order. Second, although Officer

Christenson left to resolve a "family emergency", as Launius did here, Officer Christenson found a replacement before leaving, remained in radio contact with his department, and returned as soon as the emergency was over, Launius did none of these things. Thus, the facts in *Christenson* are significantly different, and provide no support for Launius' position.

Launius finally argues that because the punishment he received was significantly stronger than the punishments received by other officers for misconduct during that period, Launius' discharge was arbitrary and capricious. The Court finds that the punishments meted out in the various cases are not unequal because the actions which were punished were different. A difference in punishments for the same acts would prove unequal treatment existed, and unequal treatment of similar cases would prove the disciplinary action of the Board was inconsistent. *Cf.*, *Basketfield v. Daniel*, 71 Ill. App.3d 877, 390 N.E.2d 492 (1st Dist., 1979). Here, the actions punished by the Board differed markedly. Officer Czyzewski, whom Launius particularly refers to, was suspended because he swore at Sergeant Neil who insisted that Czyzewski, who was at home, off duty, and hemmed in by water, should come in to help during the flood. Czyzewski was punished for insubordination for swearing at the sergeant. (Tr. vol. 3 p. 1209). Launius, in contrast, was at work and left, although he had been ordered to stay. Launius was punished for leaving his post, unbecoming conduct, failure to perform a duty responsibility, insubordination, failure to perform a duty, failure to obey rules, failure to secure a replacement and absence from duty. Thus, it is clear that Czyzewski's and Launius' cases were different. Therefore, the Board's disciplinary action in the two cases was not inconsistent.

3.

Finally, Launius argues that the Board was not impartial. The Court finds that Launius' evidence is not clear and convincing and does not support Launius' argument. The presumption is that the Board is capable of judging a particular controversy fairly on the basis of its own circumstances. *U.S. v. Morgan*, 313 U.S. 409 (1941). That presumption is only overcome where it is shown by clear and convincing evidence that the official has an unalterably closed mind in matters critical to the disposition of the proceeding. *Citizens for a Better Environment v. Illinois Pollution Control Board*, 152 Ill. App.3d 105, 504 N.E.2d 166 (1st Dist., 1987). Launius has presented no evidence of anything said or any action by any member of the board, including Chairman Wilson, evidencing that any member had an unalterably closed mind. The record shows that the board members each reaffirmed their impartiality. Thus, the presumption that the Board was impartial has not been rebutted by any clear and convincing evidence offered by Launius.

Launius further argues that at the very least he should have been given the opportunity to question the members as to their impartiality. Launius has not demonstrated that the facts in this case warranted that opportunity. The commissioners all affirmed their impartiality on the record, and were also admonished not to consider any prejudicial or improper material of which they become aware. Thus, curing any assumed breach of impartiality. *Cf., Collura v. Board of Fire and Police Commissioners*, 113 Ill. 2d 361, 498 N.E.2d 1148 (1986). Further, a plaintiff has no right to question a judge as to their impartiality, and, since the commissioners here were acting as judges no such right exist in this administrative hearing. *Mank v.*

Board of Fire and Police Commissioners, 7 Ill. App.3d 478, 288 N.E.2d 49 (5th Dist., 1972). Thus, the Court finds that Launius' request has no factual or legal support, and was rightfully denied by the Board.

CONCLUSION

For all of the foregoing reasons, the Court affirms the decision of the Board since it was neither contrary to the manifest weight of the evidence nor contrary to law.

DATE: 8/30/89

ENTER: /s/ SOPHIA H. HALL
Judge

APPENDIX D

Opinion of the Appellate Court of Illinois
First District, First Division
No. 1-89-2577 — Filed March 18, 1991

CLIFFORD LAUNIUS,

Plaintiff-Appellant,

v.

THE BOARD OF FIRE & POLICE COMMISSIONERS OF THE CITY OF DES PLAINES, A.C. WILSON, CHAIRMAN, HERMAN HERZOG and WILLIAM J. CONNOLLY, MEMBERS OF THE BOARD OF FIRE & POLICE COMMISSIONERS, and JOSEPH KOZENCZAK, CHIEF OF POLICE OF THE CITY OF DES PLAINES,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
Honorable SOPHIA H. HALL, Judge Presiding.

JUSTICE BUCKLEY delivered the opinion of the court:

This action on administrative review arises from charges brought by defendant Joseph Kozenczak, Chief of Police of the City of Des Plaines, against Clifford Launius (plaintiff), a police officer of the Des Plaines Police Department (the Department), for his conduct in leaving his assigned post on August 14, 1987. Following a hearing before defendant the Board of Fire and Police Commissioners of the City of Des Plaines (the Board), the Board found that plaintiff had violated various department rules and regulations and discharged plaintiff from service. On appeal from the circuit

court's order affirming the Board's decision, plaintiff contends that he did not receive a fair and impartial hearing before the Board, that the Board's findings are against the manifest weight of the evidence, and that the sanction of discharge is arbitrary, capricious and unreasonable.

In the early morning hours of August 14, 1987, plaintiff left his wife and two children, ages eight months and five years, at their townhouse in Wheeling, Illinois, and drove to the police station to begin the 7 a.m. to 3 p.m. second watch. He was aware enroute to the station that an excessive amount of rain had fallen overnight and that a number of roadways were impassible due to standing water. On his 6:45 a.m. arrival, plaintiff was assigned to the complaint desk and switchboard, where he was required to transfer to the dispatcher telephone calls from citizens requesting information and assistance.

Between 7:30 and 7:45 a.m., officers assigned to the desk and those on the street were advised of the implementation of the City's emergency traffic plan, which requires traffic accident victims to report accidents at the police station. At 8:25 a.m., the mayor ordered the Chief of Police to the Emergency Command Center, a coordinating center for department heads.

At approximately 7:30 a.m., plaintiff, upon noticing the heavy rainfall, telephoned his wife and requested that she check their basement for water. His wife reported no water in the basement, but stated that the lake across the street had overflowed its banks and flooded the street. Between 8 a.m. and 8:15 a.m., plaintiff's wife telephoned plaintiff to inform him that water was at that time seeping into the basement and that the lake's overflow had progressed to the front lawn and garage. Plaintiff again contacted his wife between 9 a.m. and 9:10 a.m., at which time his wife excitedly reported the continuance of the

spread of water toward the house and the continuance of water accumulation in the basement.

Plaintiff then informed Lieutenant Ronald K. Diehl that flooding was becoming a problem at his home and that, as a result, he might have to leave. Diehl refused to give plaintiff permission to leave. When plaintiff approached Diehl a second time, around 9:25 a.m., Diehl again denied plaintiff's request to leave. Plaintiff replied that his home, wife, and children were more important than "this place," and then stated that he would wait awhile.

At approximately 9:45 a.m., when plaintiff telephoned his wife, she stated in a hysterical voice that water was at the doorstep and that water was pouring in through the window wells. Between 9:45 a.m. and 10 a.m., plaintiff changed from his uniform into civilian clothes and left the police department without receiving permission to do so.

At the time of plaintiff's departure, five other police officers, including two sergeants and Lieutenant Diehl, were stationed at the desk area where the three-line switchboard was located. Plaintiff was observed by the Chief of Police, Diehl and Captain Clark as he left the station and heard them mention his name in a conversation amongst themselves. Plaintiff's position was replaced within a half an hour from his departure, and no incoming telephone calls were left unanswered.

The evidence at the hearing conflicted regarding the details surrounding plaintiff's departure. Plaintiff testified that, when he first approached Diehl regarding the problem, Diehl stated that his wife should "start bailing." Diehl denied making such a remark. Plaintiff also stated that Diehl did not respond when he spoke with him a third time and requested that he speak to the Chief of

Police on his behalf. Diehl denied speaking with plaintiff following the second conversation.

At the hearing, Diehl described the situation at the department the morning of plaintiff's departure. The department was taking incoming telephone calls, but could not make any outgoing calls. The officers were barely able to keep up with the flood-related inquiries. No squad cars were available to answer calls, and officers could not respond to all the power and alarms going off in the City. Because they could not call in additional manpower, officers on the street drove to the homes of officers living in the City to tell them to report to the station. The two sergeants manning the desk area at the time described the situation as "very hectic" and "very busy."

When plaintiff arrived at the entrance to his subdivision after the 45-minute, 8-mile drive to his townhouse development, he could not proceed further. Although the rain and the spread of water had ceased by this time, plaintiff had to walk the quarter mile to his home in water levels he estimated as ranging from ankle depth to chest high. When plaintiff reached his home, he first checked his family's safety, then checked his basement, which sustained minimal damage due to the four to six inches of water, and shortly after 11 a.m. checked on his neighbors.

Witnesses at the hearing further described the conditions at the townhouse development that day. Plaintiff's wife, who was five feet two inches in height, estimated the water in the street outside her home to be waist high at the time she spoke to plaintiff that morning. She testified that cars were unable to enter or exit the development until the next day. Plaintiff's neighbor stated that the water level, estimated to be two-and-a-half to three feet high in the street at 9 a.m., did not subside until

late afternoon. Plaintiff estimated that the water level on the street near his townhouse, as depicted in photographs taken by him sometime after 2 p.m., varied from one foot to two feet.

Plaintiff spent the remainder of the afternoon until dusk filling and hauling sandbags around his and his neighbors' homes because more rain was expected and a flash-flood warning was in effect until 2 p.m. Plaintiff could not make outgoing calls from 11 a.m. until the early evening. At approximately 9:30 p.m., Officer Timothy Veit telephoned plaintiff at his home to inform him of the 12-hour shifts at the station. Plaintiff telephoned the watch commander, Lieutenant Storm, at 9:50 p.m. to advise him of his availability for duty. Storm told plaintiff that plaintiff was put on emergency suspension with pay.

At the hearing, the parties presented evidence regarding the existence of emergency conditions and plaintiff's knowledge of such at the time of his departure. Plaintiff testified that he left a non-emergency switchboard and that he did not receive any emergency calls on that date. He was never informed of the existence of an emergency and was not informed of 12-hour shifts, which would indicate emergency conditions, until Veit's telephone call at 9:30 p.m. Plaintiff was aware that, sometime late in the afternoon of August 14, an emergency command center for the *Wheeling* Police Department and Public Works Department was established at the clubhouse near his townhouse. In plaintiff's opinion, there was no emergency at the time he left the police station.

Sergeant Neal explained that the switchboard, not the area, is classified as "non-emergency" because emergency calls are generally taken in another area, although emergency calls quite often come into the switchboard. Diehl

testified that the City was in a state of emergency on the morning of August 14, but admitted that a formal declaration of emergency was never announced and that he never informed plaintiff of the existence of a state of emergency. The Chief of Police testified that he gave the order to implement the 12-hour shifts, but it was not implemented until Captain Sturlini's arrival at the station at approximately 10:30 or 11 a.m.

At the hearing, the Board also heard charges against plaintiff stemming from a June 17, 1987, incident with a motorist. At approximately 6 a.m. on that morning, plaintiff stopped a car for driving in excess of the speed limit. Louis Sheffield, the driver of the car, inquired into plaintiff's purpose for stopping the car. Plaintiff did not respond, but instead requested Sheffield's driver's license. Plaintiff then informed Sheffield he was going 61 miles per hour in a 40-miles-per-hour zone and told him to return to his car.

When Sheffield leaned against his car, plaintiff ordered him inside his vehicle over the public address system. On plaintiff's return to the car, Sheffield leaned out of his door and stated that plaintiff had a bad attitude. Sheffield testified that plaintiff began to get "hyper," agitated and excited. Sheffield said, "forget it, give me the fuckin' ticket," and threw the ticket on the dashboard. Sheffield testified that he was agitated because of plaintiff's tone of voice and plaintiff's failure to listen to his reasons for speeding.

The testimony of plaintiff and Sheffield conflicted at the hearing regarding the physical contact made thereafter. Plaintiff testified that Sheffield struck plaintiff's hand when he handed him the ticket. He responded by grabbing Sheffield's hand, turning it over, and extending it out. He

then used his right hand to push against Sheffield's left shoulder to prevent him from opening the door.

Sheffield and Billy Clifford, the passenger in the car, immediately following the incident proceeded to the police station and signed a complaint against plaintiff.

When plaintiff arrived at the station later, he inquired of Lieutenant Diehl whether "the beef had come in yet." Sergeant Neal testified that he heard plaintiff state, upon being informed that the complaint had been filed, "Smartass, I should have broke his arm." Neal prepared a written memorandum dated June 18, 1987, reflecting the remark. Plaintiff denied that he said "smartass" and explained that the latter comment was just an off-the-cuff remark to a fellow officer.

On appeal, we first address plaintiff's contention that he was denied a fair and impartial hearing. Plaintiff argues that, despite admonishments given by the Board's attorney, the Board was prejudiced by outside matters. Plaintiff asserts that Chairperson Wilson's reported comments in a local newspaper article, "[i]t's very difficult to try and not to be prejudiced when everybody and their brother has an opinion," demonstrates the insufficiency of the admonishments.

Without a showing to the contrary, State administrators are assumed to be capable of judging a particular controversy fairly on the basis of its own circumstances. (*Collura v. Board of Police Commissioners* (1986), 113 Ill. 2d 361, 370, 498 N.E.2d 1148, 1152.) The required showing to overcome the presumption of administrative regularity is set forth in *Citizens For a Better Environment v. Pollution Control Board* (1987), 152 Ill. App. 3d 105, 111-12, 504 N.E.2d 166, 171. Plaintiff must show by clear and convincing evidence "that the official has an unalterably

closed mind in matters critical to the disposition of the proceeding."

Plaintiff has not demonstrated by clear and convincing evidence that Wilson had an unalterably closed mind. The unsubstantiated hearsay comments did not state that Wilson himself found it difficult not to be prejudiced, and the same article quotes Wilson's response to people who try to "bend his ear" as "we can't listen." There being no showing to the contrary, we cannot say that plaintiff was denied a fair and impartial hearing.

Plaintiff next argues that the findings of the Board are against the manifest weight of the evidence. Our role on administrative review of an agency's decision to discharge a public employee is limited to, first, determining whether the agency's finding of guilt is contrary to the manifest weight of the evidence, and, second, to determine if the findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge is warranted. *Walsh v. Board of Fire & Police Commissioners* (1983), 96 Ill. 2d 101, 105, 449 N.E.2d 115, 117; *Bultas v. Board of Fire & Police Commissioners* (1988), 171 Ill. App. 3d 189, 193, 524 N.E.2d 1172, 1174.

Review under the first inquiry requires a court to consider the agency's findings of fact to be *prima facie* true and correct, although the court has a duty to examine the evidence in an impartial manner and to set aside findings unsupported in fact or unsupported by substantial evidence in the record. (*Dugan's Bistro, Inc. v. Daley* (1977), 56 Ill. App. 3d 463, 467, 371 N.E.2d 1116, 1119.) The Board in the case at bar found plaintiff violated the following rules and regulations as a result of his conduct on August 14, 1987:

"9. * * * Rule 310.02 of the Rules and Regulations entitled 'Unbecoming Conduct,' in that having been denied permission to leave his assigned post and go home * * * [plaintiff] did state words to the effect that his family was more important than his job. [Plaintiff] then left his assigned post and [*sic*] the Des Plaines Police Station * * * [Plaintiff] did not return to duty on August 14, 1987 and was out of contact with the Police Department for approximately 12 hours.

10. * * * Rule 310.30 of the Rules and Regulations entitled 'Performance of Duty,' in that [plaintiff] failed and refused to perform his duties as a police officer for the City of Des Plaines when he left the City three hours after his eight-hour shift began, in defiance of his superior officer['s] * * * order denying [his] request to go home.

11. * * * Rule 310.16 of the Rules and Regulations entitled 'Duty Responsibilities,' in that [plaintiff] failed to respond to his superior officer['s] order denying [plaintiff's] request to go home * * * [and] remaining out of contact with the Police Department and, therefore, did not subject himself to duty.

* * *

13. * * * Rule 320.30 of the Rules and Regulations entitled 'Relief,' in that on that date, [plaintiff] failed to remain at this assigned post and on duty until he was properly relieved by another member of the Police Department or was dismissed by competent authority.

14. * * * Rule 320.50 of the Rules and Regulations entitled 'Absence from Duty,' in that * * * [plaintiff] failed to appear for duty from approximately 10:00 a.m., the time he left the Des Plaines police station without permission and in defiance of Lt. Diehl's order, to 3:00 p.m., the time his duty shift ended.

* * *

> 17. * * * Rule 310.24 of the Rules and Regulations entitled 'Insubordination,' in that [plaintiff], while on duty and after receiving * * * his superior officer's lawful order that he not leave his post to go home, deliberately refused to obey said lawful order, left his assigned post * * * and went to his home in Wheeling, Illinois."

Plaintiff does not dispute the Board's finding that he left his assigned post without permission and remained out of contact from the police department or that this conduct would be a sufficient basis for finding that plaintiff violated the above-stated department regulations. Plaintiff, though, disputes certain other factual findings which he claims the Board relied on to find cause for dismissal, namely, that a state of emergency existed when plaintiff left his assigned post and that plaintiff's departure had an adverse effect on the police department.

The Board asserts that plaintiff's admission of the existence of a city-wide emergency when he left his post, as well as evidence of the circumstances surrounding plaintiff's departure, support the Board's finding that plaintiff left his post during a state of emergency. The Chief of Police, on the other hand, argues that plaintiff was not discharged because a state of emergency existed in the City, but rather because plaintiff abandoned his assigned post contrary to a lawful order of his superior officer.

In paragraph 5 of the "Second Amended Statement of Charges," the Chief of Police alleged "[t]hat on August 14, 1987, a state of emergency existed in the City of Des Plaines due to the extreme amount of rain which caused widespread flooding throughout the City of Des Plaines." Although the Board did not expressly find that plaintiff left his post during a state of emergency, it noted, in paragraph 21, that plaintiff "acknowledged that as a result

of his conduct *in abandoning his post on August 14, 1987, during a city-wide emergency*, his fellow officers can no longer rely on him to carry out his assigned duties and to always be there when they need him." In paragraph 20 of its discharge order, the Board also states that plaintiff left his assigned post on a day when "approximately nine (9) inches of rain fell on the City, *resulting in a city-wide emergency*." In finding plaintiff guilty of "Unbecoming Conduct" in paragraph 9 of the order, the Board further notes that plaintiff's conduct brought the Department into disrepute "*at the very time when officers were needed to handle a major disaster* in the City of Des Plaines."

We note that the discharge order states that the Board relied on all its findings of fact and guilt in finding "cause for the officer no longer occupying his position." In light of the factual findings set forth above, we conclude that the Board considered the existence of emergency conditions in reaching its decision to discharge plaintiff.

While the record supports a finding that the City experienced severe weather conditions and at some point invoked emergency plans on August 14, 1990, a finding that plaintiff was aware of a state of emergency or that he abandoned his post during a state of emergency is not supported by the evidence. When plaintiff left the station between 9:45 and 10 a.m., in the presence of his superiors, he was not informed of a declaration of emergency. The 12-hour shifts, testified to by defendants' expert as being indicative of emergency conditions, were not implemented until after his departure. In addition, irrespective of the classification of the switchboard, plaintiff testified that he received no emergency calls before he left the switchboard and that five other persons were present in the area who could have operated the three-phone switchboard.

We do not believe that plaintiff's knowledge of the heavy rainfall and flooding and of the department's implementation of an emergency traffic plan at the time he left his post is sufficient evidence to find a state of emergency or to impute knowledge of such to plaintiff. Nor do we believe that such findings can be upheld from plaintiff's affirmative responses to opposing counsel's inquiry of whether he breached his sworn duty when he "abandoned [his] post on August 14 during a city-wide emergency" and to the statement that his fellow police officers can no longer rely upon him as a result of his conduct "in abandoning [his] post on August 14 during a city-wide emergency." These multi-faceted questions contain the undisputed fact that plaintiff left his assigned post without permission, and plaintiff's clear position throughout the hearings was that emergency conditions did not exist at the time of his departure.

Accordingly, insofar as the Board found that a state of emergency existed on plaintiff's departure or that plaintiff was aware of the existence of a state of emergency, those findings are against the manifest weight of the evidence.

As to the finding that plaintiff's departure had an adverse effect on the police department, the Board specifically found that plaintiff's conduct "brought the Department into disrepute and reflected discredit upon the plaintiff, at the very time when officers were needed to handle a major disaster in the City of Des Plaines." The only expert testimony in this regard was from Glenn R. Murphy, a law enforcement consultant, who testified that plaintiff's actions in leaving his assigned post during a state of emergency adversely affects the administration of the agency. Murphy stated that disobeying lawful orders undermines the command structure of the agency and that such con-

duct during emergency situations detrimentally affects the morale of the agency and the community relations of the department with its constituencies. Because the expert's opinion was premised upon the circumstances of an officer leaving an assigned post *during a state of emergency*—circumstances found above to be unsupported by the evidence—the expert's testimony does not provide a basis for upholding the Board's finding that plaintiff's conduct brought the Department into disrepute.

We turn now to the Board's findings as to the June 17, 1987, motorist incident. While the Board found that plaintiff used reasonable force to defend himself in the June 17 traffic incident, it found that plaintiff violated Rule 380.54 of the Rules, entitled "Conduct toward the Public," "in that when issuing a traffic citation to Louis B. Sheffield, [plaintiff] failed to remain courteous and orderly, and failed to remain calm, regardless of provocation to do otherwise." Rule 380.54 provides that "Members and employees shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly, avoiding harsh, violent, profane or insolent language and shall always attempt to remain calm, regardless of provocation to do otherwise."

The Board rejected Sheffield's claim that plaintiff was not justified in using force at the scene. The remainder of Sheffield's testimony does not support a finding that plaintiff did not act orderly at the scene. Nor does the evidence as to plaintiff's remarks at the police station support the finding. The remarks were not made in plaintiff's *dealings with the public* since they were made outside the presence of the motorists and public. In any event, the Board did not base its discharge sanction on the June 17, 1987, incident, but relied "particularly [on its] findings pertaining to [plaintiff's] conduct on August 14, 1987."

In summary, the Board's findings that plaintiff violated numerous department regulations in leaving his assigned post without permission are supported by the evidence. Insofar as the Board relied on the fact that plaintiff left his assigned post during a state of emergency, the fact that plaintiff's conduct brought the department into disrepute, and any rule violations resulting from the June 17, 1987, motorist incident, those findings are against the manifest weight of the evidence.

Under the second phase of our inquiry, we must determine whether the Board's valid findings provide a sufficient basis for cause for discharge. Our role in this regard is not that of a supercommission, which may substitute its judgment as to the more fitting sanction. Rather, we are confined to determining whether the agency's findings are related to the requirements of the service and not so trivial as to be arbitrary or unreasonable. *Walsh*, 96 Ill. 2d at 105, 449 N.E.2d at 117; *Humbles v. Board of Fire & Police Commissioners* (1977), 53 Ill. App. 3d 731, 734, 368 N.E.2d 1049, 1051; *Petraitis v. Board of Fire & Police Commissioners* (1975), 31 Ill. App. 3d 864, 868, 335 N.E.2d 126, 130.

In examining the case law pertinent to our inquiry, we have discovered that, in reviewing administrative discharge orders, the conduct must be evaluated under the circumstances of each case, and that no precise rules or definitions may be drawn as to what conduct will be found to constitute cause for discharge. Reviewing courts, however, are assisted by the general guideline that the "conduct must constitute some substantial shortcoming which renders [the] continuance in office detrimental to the discipline and efficiency of the service, and which the law and sound public opinion recognize as good reason for the officer to no longer hold his position." *Ornesto v. Police*

Board of the City of Chicago (1980), 92 Ill. App. 3d 183, 187, 416 N.E.2d 13, 16; *Coursey v. Board of Fire & Police Commissioners* (1967), 90 Ill. App. 2d 31, 234 N.E.2d 339, 341-42; *Christensen v. Board of Fire & Police Commissioners* (1980), 83 Ill. App. 3d 472, 476, 404 N.E.2d 339, 341.

In considering plaintiff's conduct here and comparing it to the conduct found to warrant or not to warrant discharge in prior appellate court decisions, we find that plaintiff's conduct is not such that the continuation of his employment would be detrimental to the discipline and efficiency of the police department, or such that sound public policy would mandate that plaintiff be discharged.

Present in the cases found by Illinois Appellate Courts to warrant discharge, and absent from the case at bar, are the type of actions which reflect dishonesty or a flaw in integrity or character and which carry an implication that the officer is unfit to serve as a police officer. In *Coursey v. Board of Fire & Police Commissioners*, 90 Ill. App. 2d 31, 234 N.E.2d 339, the discharged police officer left his assigned beat and the village limits without being relieved, and evidence was presented that the officer's purpose was to attempt sexual misconduct with minors he was escorting home after curfew. The court noted that the officer did not offer justification for his conduct or notify the department of his absence and that the gravity of his act was intensified by a similar incident six months earlier. The court also stated that the officer's actions seriously weakened the plan of community protection by disabling the officer from responding quickly to threats to life and property within his jurisdiction. *Coursey*, 90 Ill. App. 2d at 37, 234 N.E.2d at 342.

In *Bokowski v. Civil Service Comm'n* (1971), 1 Ill. App. 3d 174, 273 N.E.2d 625, the discharged Chicago fireman,

in defiance of previous orders, left his assigned apparatus for a period between two and three hours while he went to an alcohol-serving dance hall located outside the hearing of fire alarm indicators. The fireman was later involved in an altercation after a witness observed him being escorted from the women's washroom.

The discharged police officer, in *Green v. Board of Fire & Police Commissioners* (1980), 87 Ill. App. 3d 183, 408 N.E.2d 1187, slept in his squad car for two hours while assigned to patrol and disobeyed an order to return to the police station. The court noted that the officer offered no excuse for his conduct, that his conduct was "a serious case of neglect of duty," that the department's resources had to be diverted from other activities in an attempt to locate him, and that a broadcast over the State police radio network was necessitated. *Green*, 87 Ill. App. 3d at 187, 408 N.E.2d at 1190-91.

In contrast to the conduct in the above cases, the officer's misconduct here does not reflect a flaw in integrity or character. Plaintiff's actions were motivated by concern for the safety of his wife and two small children. Furthermore, plaintiff did not deceive his superior officers, unlike the cases where the officer left an assigned jurisdiction without notification, thereby jeopardizing the protection of the community in that area. Plaintiff left the desk area containing three telephone lines where five other officers were present and brought his departure to the attention of his superiors. Finally, as indicated previously, although serious flooding conditions existed at the time, the evidence does not demonstrate a state of emergency at the time plaintiff left or that plaintiff was aware of a state of emergency.

The circumstances present here are more analogous to *Christenson*, 83 Ill. App. 3d 472, 404 N.E.2d 339, and

Humbles, 53 Ill. App. 3d 731, 368 N.E.2d 1049, where courts found discharge to be unwarranted. In *Christenson*, an officer violated department rules by using his police vehicle while on duty for a personal errand 15 miles outside the city and lied to a superior officer about the personal business. The court there noted several mitigating factors, including the fact that the officer was confronted with an emergency situation concerning criminal damage to his valuable horses, the fact that the officer put another officer in charge rather than abandon his responsibilities, the fact that no emergency existed in the city, and the fact that the officer worked an hour after his shift. *Christenson*, 83 Ill. App. 3d at 477, 404 N.E.2d at 342.

The police officer in *Humbles* lied to his superior officer that he was attending court on police business when his actual business was his personal divorce case. He also disobeyed his superior's order to wait and proceed to court with him. Although the court recognized that the misconduct might tend to interfere with the discipline and efficiency of the police department, it concluded the sanction of discharge was not warranted. The court stated that the purpose of the officer's deception was to avoid a subject of embarrassment to himself and that the single incident did not carry an implication that the officer was unfit to serve as an officer or have an effect of lowering police morale or public confidence.

Plaintiff's concern for his family's welfare is even a greater mitigating circumstance than the concern for property in *Christenson* or the concern of embarrassment in *Humbles*. In addition, absent here is the aggravating circumstances of deceptive conduct present in those cases. No other aggravating circumstances exist here to justify discharge. While the circuit court noted that plaintiff did

not return to the station after he had seen to the safety of his house and family, we do not believe this fact justifies discharge. Only a few hours remained on plaintiff's assigned shift and plaintiff was not aware of the imposition of 12-hour shifts. Moreover, the misconduct here involved a single incident, unlike cases upholding discharge sanctions where the officer has a history of flagrant, deliberate, and continuing disobedience of orders which would undermine the authority and weaken the structure of the organization. See *Martin v. Matthys* (1986), 149 Ill. App. 3d 800, 808, 501 N.E.2d 286, 292.

For the reasons expounded above, we hold that the circuit court erred in finding the Board's decision to be related to the requirements of service. We alternatively find that sufficient evidence was presented as to a penalty imposed against another police officer for his misconduct during the same period of flooding to demonstrate that the Board's decision was arbitrary and unreasonable.

Officer Czyzewski, who was off duty on August 14, 1987, was contacted by a superior between 8:40 and 8:50 a.m. and ordered to report to duty, despite his repeated protests that his street was impassable. Czyzewski refused by responding with an obscenity. Czyzewski was given a four-day suspension for insubordination, and no charges were brought for his failure to report. The circuit court found that the actions of the two police officers were markedly different in that plaintiff was punished for leaving his assigned post, while Czyzewski was suspended for swearing at a superior who had insisted that Czyzewski report to work even though he was off-duty and "hemmed in" by water.

We find little significance in the fact that Czyzewski was off-duty at the time. The necessity of police officers to report to duty on command is no less important to the

efficiency of the department than the necessity of police officers to remain on assigned duty. The circuit court's reliance on testimony that Czyzewski was "hemmed in" by water is inconsistent with its reliance on its finding that plaintiff should have returned to the station after reaching his home and family under the flooding conditions. Plaintiff's conduct here is not so markedly different from Czyzewski's conduct to warrant such a more severe sanction. Both officers disobeyed orders from their superiors and did not work on assigned shifts.

Notwithstanding our findings that the sanction of discharge was unrelated to the needs of the department and arbitrary and unreasonably imposed, plaintiff's conduct in disobeying a superior officer's orders and leaving an assigned post was not excused under the circumstances and discipline was warranted. The discipline necessarily inherent in a police department would be destroyed if each officer is permitted to subjectively determine whether he believes an order to be lawful or reasonable. See *Martin*, 149 Ill. App. 3d at 809, 501 N.E.2d at 292.

Accordingly, the sanction of discharge imposed by the Board is vacated. Pursuant to the scope of our limited review, we remand this matter to the Board for consideration of an alternative, more appropriate sanction. See *Kreiser v. Police Board of the City of Chicago* (1977), 69 Ill. 2d 27, 370 N.E.2d 511; *Christenson*, 83 Ill. App. 3d 472, 404 N.E.2d 339; *Citrano v. Department of Registration & Education* (1980), 90 Ill. App. 3d 937, 414 N.E.2d 74; *Basketfield v. Daniel* (1979), 71 Ill. App. 3d 877, 390 N.E.2d 492.

REVERSED AND REMANDED.

MANNING, P.J., concurring.
CAMPBELL, J., dissenting.

JUSTICE CAMPBELL, dissenting:

I respectfully dissent for two reasons. First, the findings of the Board in regard to whether an emergency existed on August 14, 1987, are not against the manifest weight of the evidence.

Findings and conclusions of an administrative agency on questions of fact are to be held *prima facie* true and correct. (Ill. Rev. Stat. 1987, ch. 110, par. 3-110). Where an opposite conclusion is not clearly evident, the decision cannot be reversed; that an opposite conclusion might be reasonable is not sufficient. (*Kvidera v. Board of Fire & Police Commissioners* (1989), 192 Ill. App. 3d 950, 960, 549 N.E.2d 747, 753; *Keen v. Police Board* (1979), 73 Ill. App. 3d 65, 70, 391 N.E.2d 190, 194-95.) Moreover, conflicts in testimony and the credibility of witnesses are properly left for the Board to resolve. (*Price v. Board of Fire & Police Commissioners* (1985), 139 Ill. App. 3d 333, 339, 487 N.E.2d 673, 677.) The Board's findings cannot be reversed unless we are able to say that "*all* reasonable and unbiased persons, acting within the limits prescribed by law and drawing all inferences in support of the finding[s], would agree that the finding[s] [are] erroneous." *Sheehan v. Board of Fire & Police Commissioners* (1987), 158 Ill. App. 3d 275, 287, 509 N.E.2d 467, 476 (emphasis added).

The majority holds today that there is insufficient evidence to support the findings in the Board's order discharging the plaintiff. The contested findings include: paragraph 20 of the discharge order, which found that plaintiff abandoned his assigned post when "approximately nine (9) inches of rain fell on the City, resulting in a city-wide emergency"; paragraph 21, which finds that plaintiff "acknowledged that as a result of his conduct in abandoning

his post on August 14, 1987, during a city-wide emergency, his fellow officers can no longer rely on him to carry out his assigned duties and to always be there when they need him"; and paragraph 9, which finds that plaintiff's conduct brought the Des Plaines Police Department into disrepute "at the very time when officers were needed to handle a major disaster in the City of Des Plaines."

The record contains substantial evidence in support of the Board's finding that there was a city-wide emergency at the time plaintiff abandoned his post. Lieutenant Diehl's testimony supports this finding. Plaintiff himself acknowledged that he left his post during an emergency. Plaintiff was aware that there was excessive railfall and that a number of roadways were impassible as a result. Plaintiff was assigned to the complaint desk at 6:45 a.m. and the officers assigned to the desk were subsequently advised of the implementation of the City's emergency traffic plan.

The police were barely able to keep up with flood-related calls; officers were unable to respond to the power outages and alarms that resulted from the flood conditions. The police were also unable to make outgoing calls and consequently could not call additional officers to duty except by driving out to their homes.

Nevertheless, plaintiff telephoned his wife three separate times that morning. The record also provides ample support for the inference that the reason plaintiff was concerned about his family was the flooding occurring in his neighborhood. Implicit in today's decision is that the flooding was somehow a serious enough danger to justify plaintiff's decision to abandon his assigned post, in defiance of the direct order of his superior, yet simultaneously not so obvious a danger as to allow the Board to find that plaintiff was aware of emergency conditions.

The evidence appearing in the record which suggests that an emergency did not exist is plaintiff's testimony that in his opinion, there was no emergency at the time he left. This testimony is contrary not only to the testimony of Lieutenant Diehl, but also to plaintiff's own acknowledgement that he left during a city-wide emergency. Plaintiff stated that there were five other persons who could have manned the switchboard following his departure, although the record reflects that plaintiff walked away from his duties as an officer during a situation where the police department sought more officers, not fewer.

The majority chooses to discount Lieutenant Diehl's opinion that emergency conditions existed because he also stated that there had been no formal declaration of a "state of emergency." The majority also discounts the expert testimony that plaintiff's dereliction of his duties would adversely affect the police department because it was supposedly premised on the existence of a "state of emergency." The record contains no evidence that the expert was referring only to situations where there was a formally declared "state of emergency." The majority opinion finds that when plaintiff abandoned his post, "he was not informed of a declaration of emergency," but offers no suggestion of who would be required to issue such a declaration or what the declaration must encompass in order to support a finding that a "state of emergency" existed or that plaintiff was aware of it. (*Cf.* Ill. Rev. Stat. 1987, ch. 127, pars. 1104(b) (definition of "disaster"), 1108 (authorizing Governor to declare "disaster emergencies"), 1113 (authorizing principal executive officer of municipality to declare "local disaster emergencies").) The majority further fails to cite any authority for the proposition that there must be a formal declaration of a "state of emergency" before the Board could find that the conditions which

existed were such that plaintiff knew or should have known that it would be a severe dereliction of duty to leave his post.

Given this record, it is my opinion that a reasonable and unbiased person, drawing all inferences in favor of the findings, could find that emergency conditions existed and that plaintiff was aware of them when he abandoned his post for personal reasons. (*Sheehan*, 158 Ill. App. 3d at 287, 509 N.E.2d at 476.) At most, the evidence conflicted regarding the existence of emergency conditions and plaintiff's knowledge of such at the time of his departure. The Board chose to resolve the conflicting evidence against plaintiff; we cannot choose otherwise. (*Price*, 139 Ill. App. 3d at 339, 487 N.E.2d at 677.) The majority's contrary finding may be reasonable, but it does not warrant a reversal in this case. *Kvidera*, 192 Ill. App. 3d at 960, 549 N.E.2d at 753; *Keen*, 73 Ill. App. 3d at 70, 391 N.E.2d at 194-95.

Second, I dissent because plaintiff's discharge is legally supportable regardless of whether a "state of emergency" had been declared or existed. In reviewing police discharges, the question for the appellate court is whether the sanction is unreasonable, arbitrary or unrelated to police service, not whether this court would have levied a lesser sanction. (See *Kloss v. Board of Fire & Police Commissioners* (1983), 96 Ill. 2d 252, 258, 449 N.E.2d 845, 849.) The wisdom, necessiry or propriety of any action regarding the administration of a police force is the province of the municipality, and will not be reversed unless a manifest and palpable abuse of discretion is shown. (*Braje v. Board of Fire & Police Commissioners* (1985), 139 Ill. App. 3d 90, 487 N.E.2d 91.) This court has long held that an officer who disobeys a proper order of a superior may

be discharged. *E.g., Zinser v. Board of Fire & Police Commissioners* (1961), 28 Ill. App. 2d 435, 172 N.E.2d 33.

The cases the majority classifies as involving "actions which reflect dishonesty or a flaw in integrity or character" are not distinguishable from the instant appeal on those grounds. For example, in *Coursey v. Board of Fire & Police Commissioners* (1967), 90 Ill. App. 2d 31, 234 N.E.2d 339, there was evidence that an officer attempted sexual misconduct with minors, but the board made no finding concerning that alleged attempt. (*Coursey*, 90 Ill. App. 2d at 41, 234 N.E.2d at 343.) In *Bokowski v. Civil Service Commission* (1971), 1 Ill. App. 3d 174, 273 N.E.2d 625, an officer was charged with neglect of duty, being absent from duty without permission and entering a place where liquor was sold while on duty for reasons unrelated to service. There was no charge alleging improper conduct concerning a fight or a women's washroom. In *Green v. Board of Fire & Police Commissioners* (1980), 87 Ill. App. 3d 183, 408 N.E.2d 1187, this court upheld the discharge of an officer who slept for two hours on patrol and disobeyed an order to return to the station. As in *Green*, a diversion of police resources was required by the plaintiff's behavior in this case. Moreover, Green did offer an excuse, though it was rejected as "no defense" by this court. *Green*, 87 Ill. App. 3d at 187, 408 N.E.2d at 1191.

The majority likens this case to *Christenson v. Board of Fire & Police Commissioners* (1980), 83 Ill. App. 3d 472, 404 N.E.2d 339, and *Humbles v. Board of Fire & Police Commissioners* (1977), 53 Ill. App. 3d 731, 368 N.E.2d 1049. These comparisons must rely on the supposed requirement of a "state of emergency." In *Christenson*, the officer tried to stay in radio contact with the

station and "[h]is presence was not compelled by any emergency." (*Christenson*, 83 Ill. App. 3d at 477, 404 N.E.2d at 342.) The record here does not indicate that plaintiff tried to stay in contact with the station.

In *Humbles*, there was no indication that the officer's action would lower police morale or undermine public confidence in the police. (*Humbles*, 53 Ill. App. 3d at 735, 368 N.E.2d at 1051.) In this case, the Board heard expert testimony on the issue, testimony the majority rejects as falsely premised.

The majority alternatively finds sufficient evidence regarding the conduct of another officer to indicate that the Board's penalty regarding plaintiff was arbitrary and unreasonable. The conduct of the other officer is not before this court. Sufficient cause for discharge may exist regardless of whether another officer received different treatment. (*Sheehan*, 158 Ill. App. 3d at 287, 509 N.E.2d at 476.) Moreover, one could logically conclude that the lesser sanction in the other case militates as much in favor of the lesser sanction being unreasonable. The majority also finds the circuit court's reliance on testimony that the off-duty officer was "hemmed-in" by water inconsistent with its finding that plaintiff should have returned to the station after checking on his family. Yet this supposed inconsistency would be justified if the finder of fact decided that the other officer was in fact "hemmed-in" and plaintiff was not. This court is not the finder of fact. Furthermore, it would appear that a similar inconsistency would then be manifest in finding that the flooding in plaintiff's neighborhood was severe enough to justify abandoning his post, but not severe enough in the other parts of the city to find that emergency conditions existed.

In sum, today's decision does not give sufficient weight to the reality that the police department is a paramilitary organization with a chain of command. (*Martin v. Matthys* (1986), 149 Ill. App. 3d 800, 501 N.E.2d 286.) A rule permitting each officer to subjectively determine whether he believes an order to be lawful and reasonable would destroy the discipline necessarily inherent in a paramilitary organization such as the police department (*Phillips v. Hall* (1983), 113 Ill. App. 3d 409, 447 N.E.2d 418; *Williams v. Police Board* (1972), 8 Ill. App. 3d 345, 290 N.E. 2d 669; *Coursey*, 90 Ill. App. 2d at 31, 234 N.E.2d at 339) and would thwart the authority and respect which is the foundation of the effective and efficient operation of a police force. (See *Myers v. Police & Corrections Merit Board* (1978), 67 Ill. App. 3d 223, 384 N.E.2d 805.) Plaintiff's conduct cannot be excused. The discipline imposed was clearly related to the needs of the Des Plaines Police Department, given the facts and circumstances of this case.

For all of the aforementioned reasons, I would affirm the judgment of the Board and the circuit court.

APPENDIX E

Nos. 72070 & 72075 (Cons.)

IN THE
SUPREME COURT OF ILLINOIS

CLIFFORD LAUNIUS,

Plaintiff-Appellee,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF DES PLAINES, ILLINOIS; A. C. WILSON, Chairman, HERMAN HERZOG and WILLIAM J. CONNOLLY, Members of the Board of Fire and Police Commissioners; and JOSEPH KOZENCZAK, Chief of Police of the City of Des Plaines, Illinois,

Defendants-Appellants.

Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-89-2577. There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 88 CH 5826. The Honorable Sophia H. Hall, Judge Presiding.

PETITION FOR REHEARING OF PLAINTIFF-APPELLEE, CLIFFORD LAUNIUS

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INTRODUCTION

In this petition for rehearing, Clifford Launius, the plaintiff-appellee, implores this Court to reconsider its reversal of the appellate court decision by referring to the inalienable right of protecting one's life or the lives of one's family as expressed in the Declaration of Independence of 1776 and reaffirmed in the Fifth and Fourteenth Amendments of the United States Constitution.

Throughout these proceedings, commencing with the hearing before the administrative agency, continuing with the appeals to the Circuit Court of Cook County, the Appellate Court, First District, and to this Supreme Court of Illinois, the issue of the plaintiff-appellee's inalienable right to protect his family was argued extensively as an extenuating circumstance mitigating his disobedience of an order to remain at his post.

Before addressing the arguments relative to the petition for rehearing, the plaintiff-appellee, for purposes of emphasis, shall quote directly from the Declaration of Independence, 1776, and the Fifth and Fourteenth Amendments of the United States Constitution, that the plaintiff-appellee had an inalienable right to protect the lives of his family as protected by the Fifth and Fourteenth Amendments of the United States Constitution which right has been subordinated by the decision of this Supreme Court contrary to the Declaration of Independence of 1776 and the Fifth and Fourteenth Amendments of the United States Constitution.

The Declaration of Independence states:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are ***Life, Liberty and the Pursuit of Happiness***."

The pronouncement as found in the Declaration of Independence in 1776 is embodied in the Fifth and Fourteenth Amendments, as hereinafter noted:

> Amendment V
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of *life*, *liberty*, or *property*, without due process of law; nor shall private property be taken for public use, without just compensation.

> Amendment XIV
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of *life*, *liberty*, or *property*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

On the basis of the Declaration of Independence, 1776, and the Fifth and Fourteenth Amendments of the United States Constitution, there is no question that a police officer, such as Clifford Launius, has the inalienable right to protect the lives of his family.

Nevertheless, in its slip opinion decision, at page 19, this Court states:

> A police officer does not have the option of performing his duties when he wishes. Plaintiff admitted that as a police officer, it was his primary and sworn duty to protect the lives and property of the citizens of Des Plaines. The board found, *inter alia*, that plaintiff abandoned his post, that he "refused to perform his duties as a police officer," that he "demonstrated a substantial shortcoming which render(ed) continuance in employment in some way detrimental to the discipline and efficiency of the Police Department"; and consequently, the board ordered that plaintiff be discharged from his position as a police officer. This decision was neither unrelated to the needs of the service nor arbitrary and unreasonable.

This Court's decision has been interpreted as standing for the proposition that one's duty to government is more paramount than one's duty to family, as is evidenced by a Chicago Tribune headline, dated September 25, 1992, which reads "Duty or home? Court says cop chose wrong." (A copy of said Chicago Tribune headline and article are attached as Exhibit A.)

Furthermore, in the Des Plaines Journal, September 25, 1992, in interpreting the decision, Burton Odelson, attorney for the Board of Fire and Police Commissioners of the City of Des Plaines, is quoted as saying, "In an emergency, you have to put the welfare of the citizens first, and the family second." (A copy of the newspaper article of the Des Plaines Journal is attached as Exhibit B relating to Burton Odelson's quotation.)

Reviewing the Des Plaines Journal article, it is also significant that Burton Odelson, attorney for the City of Des Plaines Fire and Police Commission, implies that the firing was extreme when he states:

> "If they (Board of Fire and Police Commissioners of the City of Des Plaines, Illinois) had had the latitude

> to suspend for 90 days, the Board could have seriously looked at that option."

Therefore, because of the significance of this Illinois Supreme Court decision, relative to impacting upon the inalienable rights to protect one's family, it is suggested by the plaintiff-appellee that the court reconsider its position, pursuant to Arguments I, II, and III of this Petition for Rehearing.

ARGUMENT I

THAT THE PLAINTIFF-APPELLEE WAS CONFRONTED WITH CHARGES THAT RELATED TO A STATE OF EMERGENCY, AND THAT THIS COURT'S DECISION CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In its appellate court decision, at page 554, the majority opinion recognized that the plaintiff-appellee was confronted with charges that related to a state of emergency when it observed:

> In paragraph 5 of the "Second Amended Statement of Charges," the chief of police alleged [t]hat on August 14, 1987, a state of emergency existed in the City of Des Plaines due to the extreme amount of rain which caused widespread flooding throughout the City of Des Plaines."

Martich v. Ellis, 1 Ill.App.3d 1098, 1101 (1st Dist. 1981), requires that respondent be disciplined for properly enumerated charges.

In this instance, the plaintiff-appellee was not disciplined for properly enumerated charges, since those charges were premised on a state of emergency.

Because the plaintiff-appellee had to defend himself against charges that were premised on the existence of "a state of emergency," the plaintiff-appellee produced abundant evidence that no state of emergency existed at the time he left his post. This absence of the existence of a state of emergency was corroborated by the testimony of Lt. Diehl, the supervisor who denied the plaintiff-appellee permission to leave his post to attend the needs of his family (C1577); the testimony of Chief Kozenczak, who testified that the state of emergency implementation of the 12-hour shifts occurred after Launius had left as supported by the testimony of Capt. Sturlini who was in charge of implementing the 12-hour shifts (C847-848); and the testimony of Launius himself (C1491).

Consequently, it is suggested to this Court that the plaintiff-appellee met his burden of defending himself against the charges that were premised upon the existence of a "state of emergency" and that any references in the charges to the existence of the city-wide emergency were facts not known to the plaintiff-appellee as he left his post (C214-215, C1504).

ARGUMENT II

THAT, ALTHOUGH THE SUPREME COURT OF ILLINOIS HAS RECOGNIZED THE EXISTENCE OF A DURESS DEFENSE, IN THIS INSTANCE, IT IMPROPERLY APPLIED THAT DURESS PRINCIPLE RESULTING IN A DENIAL OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In its slip opinion, page 13, this Supreme Court of Illinois recognizes the military defense of duress. Such a defense is a question of fact that is to be considered by a Board of Fire and Police Commissioners.

At the same time, on page 14 of its slip opinion, this Supreme Court of Illinois questions whether the Board of Fire and Police Commissioners actually considered the duress as a mitigating circumstance, when this Supreme Court poses an assumption, "arguendo" the Board recognized duress as a defense, and this Court observed that "it cannot seriously be contended that the plaintiff was under duress for the entire period in which he was absent from his post."

Based upon the above observation, this Court holds that the duress was of limited nature when the plaintiff-appellee discovered that his family was not in danger at or about 11:00 A.M., and the plaintiff-appellee should have returned to his police department after determining that his family was safe.

It is humbly suggested to this Court that, since the Court noted that the plaintiff-appellee had been tracking the weather reports continuously and determined that those reports indicated a flash flood warning at least until 2:00 P.M., that was a duress which existed at least to that point of time.

Furthermore, because the plaintiff-appellee had been under duress with reference to the safety of his wife and children at least to 2:00 P.M. on the day in question, and because he was not aware that the shift change had occurred resulting in an emergency, and could not be contacted by phone since it was inoperable (Slip opinion pp. 18-19), under appropriate military law, *United States v. Graham*, 3 M.J. 962 (NCMR 1977) at page 965, a copy of said decision marked Exhibit C and attached herein, it is noted:

> A mistake of fact may be a defense to the general intent offense of unauthorized absence if it is both honest and reasonable.

In this instance, the plaintiff-appellee, when he left his post in disobedience of an order, honestly and reasonably believed that the lives of his family were in danger, constituting duress, which duress remained based upon weather reports indicating a flash flood warning lasting until 2:00 P.M.; because he was not aware of the changes of the shifts from three shifts to two shifts indicating a state of emergency, and because it would have required approximately 45 minutes for him to return to his place of work, the plaintiff-appellee chose to remain at his residence, since he was under the honest and reasonable mistaken belief that his shift was ending at 3:00 P.M. which would have been the approximate time of his return to the police department.

As a result, this Supreme Court, in fairness to the plaintiff-appellee under the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution relating to his inalienable right to protect his family, should have remanded this cause to determine if the Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, had considered the duress defense, or alternatively the defense of mistake, since, in its findings, the Board of Fire and Police Commissioners never specifically referred to such defenses in reaching its decision of termination.

ARGUMENT III

THAT THE COURT'S DECISION DENIED EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN IT DOES NOT CONSIDER AWOL AS THE CENTRAL NEXUS CONNECTING BOTH THE REFUSAL TO COME IN BY CZYZEWSKI AND THE DISOBEDIENCE OF AN ORDER NOT TO LEAVE HIS POST BY THE PLAINTIFF-APPELLEE.

As stated previously, this Supreme Court has recognized the defense of impossibility justifying Czyzewski's failure to appear.

However, there is no question that Czyzewski was AWOL; likewise, there is no question that the plaintiff-appellee was AWOL, yet this Court states at page 19 of its slip opinion:

> Plaintiff testified that he followed the weather reports after leaving the station and that "there was a flash flood warning * * * in effect for 2:00 P.M. that afternoon. More rain was expected." This warning does not compare with the obstruction which prevented Czyzewski from reporting to duty. If anything, this flash-flood warning should have induced plaintiff to return to duty.

By its decision, this Illinois Supreme Court approved the court martial of the plaintiff-appellee with the sentence of death being pronounced.

In commenting upon the Illinois Supreme Court decision, the former police chief of the City of Des Plaines, Illinois, Police Department, Joseph Kozenczak, observed in the Des Plaines Journal, dated September 25, 1992 (a copy of said article previously marked herein as Exhibit B):

> "It was a very difficult decision I had to make, but I felt it was justified," added Kozenczak. "You can't

> have a police officer go AWOL during an emergency. It's unheard of."

At the same time, the Board of Fire and Police Commissioners attorney, Burton Odelson, in the same newspaper is quoted as follows:

> "A police force is paramilitary which means they have to follow orders. If he (Launius) was in the military he would have been court marshalled (sic)."

Interestingly and ironically, in plaintiff-appellee's brief, on pages 37 and 38, Chief Kozenczak was asked if Czyzewski's conduct would have constituted a court martial, at C865-866:

Q. Czyzewski, Czyzewski, I pronounce it the way it should be pronounced. All right. Now, on Czyzewski, you said he called and said he couldn't come in, right?
A. No, he was called by the sergeant in the process of calling officers back.
Q. All right. And he said—what did he say to the sergeant?
A. "Fuck you, I am not coming in."
Q. Fuck you?
A. Yes.
Q. That's a disobedience of an order, isn't it, fuck you?
A. It's more of an insubordination in the sense of the language he used.
Q. We were both in the military and you say this is a para-military organization, right?
A. Yes.
Q. If I said to you in the military, "Fuck you, Captain," what would you say?
A. You're court martialed.
Q. You bet, court martialed. Now, are you a paramilitary organization or not here?
A. Sure, we are.

It is indeed incongruous for the Board of Fire and Police Commissioners of the City of Des Plaines, through its former police chief, Joseph Kozenczak, and its legal counsel, Burton Odelson, to maintain that Launius' punishment of discharge was appropriate on the basis that, in the military, he would have been court martialed, while Czyzewski's conduct, which would have merited a court martial in the military, resulted in no punishment for the AWOL incident, and only a four day punishment for insubordination.

Consequently, the observations of former chief Kozenczak and legal counsel, Burt Odelson, of the Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, establish that the cases were sufficiently related from the standpoint of court martial considerations stemming from the same AWOL incident, contrary to this Court's observation that the factual situations were "not sufficiently related," slip opinion, page 18.

Granted that the Illinois Supreme Court recognized Czyzewski's impossibility to report for work based upon a physical obstruction, surrounding flood waters, yet this Court has refused to acknowledge the plaintiff-appellee's mental obstruction, duress, in perceiving that the lives of his wife and children were in jeopardy, in his initial response to his wife's call for help, with his perception being further amplified by the threat of an impending flash-flood.

Because this Court chose to consider the flash-flood warning as a compelling consideration for the plaintiff-appellee to return to work rather than to protect the lives of his family, page 19, slip opinion, in the immortal words of Patrick Henry, "Give me liberty or give me death," this court sentenced the plaintiff-appellee to death because he exercised his liberty of an inalienable right to protect the lives of his family.

CONCLUSION

For the reasons enumerated herein, the plaintiff-appellee prays that this Court reverse its decision reversing the Appellate Court and reinstate the decision of the Appellate Court by reversing its affirmation of the Circuit Court decision.

Respectfully submitted,

/s/ Stanley H. Jakala
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Exhibit A

Chicago Tribune

(9-25-92)

Duty or home? Court says cop chose wrong

By William Grady and Flynn McRoberts

Confronted with a choice between duty and family in 1987 when floodwaters appeared to threaten his home, Clifford Launius opted for family.

Launius, then a Des Plaines police officer, left his post while the suburb and much of the Chicago area were struggling to cope with flooding during record rains.

He went home during the middle of his shift because he was concerned for the safety of his wife and two young children.

It was the wrong choice, said the Illinois Supreme Court in ruling Thursday that Des Plaines officials acted properly when they dismissed Launius from the police department.

"A police officer does not have the option of performing his duties when he wishes," the state high court said.

Burton Odelson, a municipal-law expert and the lawyer who represented Des Plaines before the Supreme Court, said the decision was a significant victory for municipalities, police chiefs and "law and order."

Launius, 35, said he was disappointed by the ruling but not with the choice he made that Friday morning in August more than five years ago.

"In the last five years, I've never thought twice about it," he told reporters after learning of the ruling. "I thought my family was in jeopardy, and I met with a callous reaction from my supervisor. I made my decision and I'll

stand by it. If anything, I'd go home a lot sooner the next time."

The decision by the state Supreme Court is the latest chapter in a story that has brought Launius nationwide publicity, with features in People magazine and USA Today and appearances on "Donahue."

But the controversy began quietly enough with a telephone call to his wife at their home in Wheeling.

A heavy rainstorm that began on the night of Aug. 13—and would not end until around noon the next day—was dumping more than nine inches of rain on parts of the Chicago area.

Traffic was snarled, and the roads leading to O'Hare International Airport were impassable for hours. Des Plaines was experiencing the worst flooding in its history, with half of the city's streets blocked at one time or another, according to written arguments filed with the court.

Launius reported for work at 7 a.m. on Aug. 14 and was assigned desk duty to handle telephone calls to Des Plaines police and walk-in complaints.

Around 7:30 a.m., he called his wife, Lori, because he was concerned about the downpour. She told him the basement of their townhome was dry but said water from a nearby lake was flooding the streets.

There were three more phone conversations with his wife between 8 a.m. and 9:45 a.m. The last, according to testimony before the Des Plaines board of police and fire commissioners, was a hysterical call from his wife that water was at the door and coming through the window wells.

After unsuccessfully seeking permission to leave, Launius changed out of his uniform and drove home.

Five years later, that decision still is an unpopular one among some of his former colleagues. "If we all walked off our jobs, what would you have in the community? It would be chaos," said Detective Sgt. Larry Zumbrock of

the Des Plaines police. "We're the first line of defense between law and order, and chaos."

Zumbrock said 18 inches of water poured into his own basement during the flood, causing almost $9,000 in damage. "There were other police officers who lived on that block. They suffered, too. But we all came in to work that morning," he said.

Though there was water in Launius' basement, damage to the family's home was minimal. He spent the rest of the day helping neighbors and hauling sandbags, unaware until 9:30 p.m. that Des Plaines had implemented a state of emergency and 12-hour shifts for its police officers.

Joseph Kozenczak, then Des Plaines police chief, sought his dismissal, contending that his insubordination undermined department discipline.

On Thursday, Kozenczak, who now operates a private investigation firm in Oak Brook, said the ruling "confirmed my initial feelings as a police administrator, that the man should be dismissed."

The police board and a Cook County Circuit Court judge agreed.

In a 2-1 decision in March 1991, though, the Illinois Appellate Court ruled the penalty was too harsh and ordered the police board to consider a lesser punishment.

The Appellate Court's majority said there was not enough evidence to justify firing Launius. The majority also said the discipline imposed on another officer for flood-related misconduct was less severe. But the state Supreme Court said that evaluating the evidence was a job for the police board rather than the Appellate Court.

"Certainly fundamental to the needs of the service is that when a police officer reports for duty, is assigned to a post, and is then refused permission to leave that post, he ought to obey the order of his superior officer and remain there," wrote Justice Thomas J. Moran, who authored the high court's opinion.

The court also noted Launius could have returned to duty after determining his family was not in serious danger, but chose not to.

Stanley Jakala, the lawyer who represented Launius, said the court's decision sends a message to police officers throughout the state.

"It means that police officers can be fired in cases for attending to the needs of their family," said Jakala, who said he was considering an appeal to the U.S. Supreme Court. "Service to the department comes first; the family comes second."

Launius and his family still live in Wheeling. He had been a Des Plaines police officer for eight years at the time.

After his dismissal, he attempted unsuccessfully to find work with five other suburban departments. He is now employed by United Airlines in supply distribution at O'Hare.

Des Plaines Mayor Michael Albrecht, a Des Plaines police officer from 1969-89, said he wished Launius well, adding, "being a former policeman, I have some compassion on both sides of this."

But he said the appellate court decision had "severely impacted [police chiefs'] ability to effectively run their departments, whether in an emergency or non-emergency."

Exhibit B

Des Plaines Journal

(9-25-92)

Top Court OKs Launius Firing

The Illinois Supreme Court yesterday (Thursday) ruled that the firing of Des Plaines police officer Clifford Launius for abandoning his police station post during the height of one of the worst storms in the city's history in 1987 was appropriate.

With its decision, the top court reversed an Illinois Appellate Court ruling which said that Launius' firing was unreasonable. The appellate court ruling came after a Cook County Circuit Court judge decided in favor of the city that Launius' dismissal was justified.

"This case is critical for municipalities and police and fire boards," said attorney Burt Odelson who argued the case on behalf of the three-member Des Plaines Board of Fire and Police Commissioners.

"A police force is paramilitary which means they have to follow orders. If he (Launius) was in the military he would have been court marshalled."

Launius abandoned his police station front desk post on Aug. 14, 1987 at the height of one of the worst storms ever to hit the Des Plaines area. More than nine inches of rain fell that morning during a short time period resulting in massive flooding and hundreds of calls streaming into the police station from people seeking assistance.

Launius left his post because he feared for the safety of his wife and two small children in their Wheeling home due to flooding. He had asked his superior for permission to leave, which was denied because of the emergency conditions.

Then Police Chief Joseph Kozenczak filed charges against Launius asking the police and fire board to dismiss him because of his actions. Following months of public hearings and testimony, the board voted to fire Launius.

The board's decision reached the seven member Illinois Supreme Court after an appellate court voted 2 to 1 to reverse an earlier Circuit Court decision that upheld the firing. The appellate court ruled that the police and fire board "could consider a more appropriate sanction" against Launius.

Police and fire board rules allow for up to a 30 day suspension for violation of department rules. Any other punishment stricter than 30 days would be an officer's firing.

"In an emergency you have to put the welfare of the citizens first and family second," said Odelson.

"If this was any other day and he had a problem at home, they probably would have let him go."

Odelson said he doubts that the state Supreme Court's decision will be appealed to the U.S. Supreme Court.

"There's no other avenue here. There's no federal issue. I'm sure the U.S. Supreme Court would not hear this," Odelson said.

All seven Illinois top court justices voted in favor of the city's position.

"If our case had not been reversed we probably would have brought up some type of legislative action in the Illinois General Assembly to allow police and fire chiefs the latitude to discipline in the future," Odelson added. He also said that presently there is a proposal before the City of Des Plaines to allow the police and fire board to suspend employees for up to 90 days without pay for serious violations of departmental rules and regulations.

"If they had had the latitude to suspend for 90 days, the board could have seriously looked at that option," Odelson said.

"A police officer does not have the option of performing his duties when he wishes," said the Illinois Supreme Court in its written opinion. "The decision was neither unrelated to the needs of the service nor arbitrary and unreasonable."

Des Plaines Journal

(9-25-92)

Former Chief Feels Vindicated By Ruling

By TODD WESSELL
Managing Editor

Joseph Kozenczak, the former Des Plaines police chief who sparked the national debate over whether police officer Clifford Launius should be fired for abandoning his post during the height of a 1987 emergency here, said he is "extremely pleased" with the decision by the Illinois Supreme Court to uphold Launius' dismissal.

"Essentially it (the court decision) confirms everything I've stood for," said Kozenczak during a telephone interview yesterday (Thursday). "The decision, I believe, was necessary. It solidifies police chiefs and fire chiefs' decisions and re-confirms what public safety is all about. If you don't have appropriate control, you'll have chaos."

It was Chief Kozenczak, who in late summer, 1987, filed charges against officer Launius with the three-member Board of Police and Fire Commissioners asking for his dismissal. Kozenczak said Launius should lose his job because he left his police station post without authorization after his wife pleaded with him to come home because of rising flood waters.

On Aug. 14 of that year one of the worst storms ever to hit Des Plaines caused massive flooding in the Northwest suburbs resulting in millions of dollars in damage. Launius was working the front desk at the downtown police station during the height of the storm at the time. Requests he made to go to his Wheeling home were denied by superiors.

Following Kozenczak' request for Launius' filing [sic] the police and fire board conducted numerous public hearings which eventually resulted in its decision to dismiss him. Following an appellate court ruling that the firing was too harsh a penalty, the top state court made its ruling that the dismissal was appropriate.

"It was not a pleasant thing," said Kozenczak. "The matter took its toll in a lot of different ways."

Kozenczak, who retired from the Des Plaines police force approximately three years ago, said "initially I stood alone" in the Launius case. "My stance was not a popular stance. Various politicians in the community and other types of organizations in the community felt it was too harsh.

"It was a very difficult decision I had to make, but I felt it was justified," added Kozenczak. "You can't have a police officer go AWOL during an emergency. It's unheard of."

Exhibit C

[3 M.J. 962 (NCMR 1977)]

UNITED STATES

v.

Charles S. GRAHAM, 237 86 5660, Private (E-I), U. S. Marine Corps.

NCM 77 0291.

U. S. Navy Court of Military Review.

29 July 1977.

The accused, a private in the United States Marine Corps, appealed from his conviction by special court-martial, judge alone, of unauthorized absence. The Navy Court of Military Review, Baum, J., held, inter alia, that military jurisdiction was not lacking by virtue of asserted recruiter misconduct.

Affirmed and sentence reassessed.

Gregory, J., concurred and filed opinion.

LT Christopher C. Henderson, JAGC, USNR, Appellate Defense Counsel.

LT H. S. Pointer, JAGC, USN, Appellate Government Counsel.

Before CEDARBURG, C. J., and BAUM and GREGORY, JJ.

BAUM, Judge:

Appellant, contrary to his pleas of not guilty, was convicted by special court-martial, judge alone, of unauthorized absence from 7 November 1974 to 18 February 1976, in violation of Article 86, UCMJ, 10 U.S.C. § 886. The sentence as approved below consists of a suspended bad conduct discharge, confinement at hard labor for three months, and forfeitures of $200 per month for three

months. Appellant assigns as error before this Court that the court-martial lacked jurisdiction over him, that he was denied his right to a speedy trial, and that the evidence of record is insufficient to prove unauthorized absence beyond a reasonable doubt.

I

Jurisdiction

At trial, appellant moved for dismissal of the Charge and specification for lack of jurisdiction, and before this Court he also argues lack of jurisdiction based on two theories. First, he asserts recruiter misconduct that renders the enlistment void under the rule expressed in *United States v. Russo*, 23 U.S.C.M.A. 511, 50 C.M.R. 650, 1 M.J. 134 (1975). Evidence submitted on this issue established that at the time he enlisted appellant was on supervised probation with five years suspended confinement for a civilian conviction of felonious larceny. Enlistment under such circumstances was clearly contrary to Marine regulations. Appellant testified that he informed his recruiter of the facts but that his recruiter told him that he, the recruiter, would take care of it and that appellant should not list the conviction on the enlistment forms since the conviction was as a juvenile. The Government called two recruiters who both denied such wrongdoing. The standard of proof on the issue of jurisdiction when unauthorized absence is charged is proof beyond a reasonable doubt. *United States v. Spicer*, 3 M.J. 689 (N.C.M.R. 1977). Upon consideration of all the evidence presented on this issue, we are convinced beyond a reasonable doubt that there was no recruiter misconduct involved in the enlistment of appellant and that his enlistment, contrary to regulations, was effected through his intentional concealment of information that would have been disqualifying. Appellant's enlistment was therefore not void; it was, instead, voidable at the option of the Government. *In re Grimley*, 137 U.S. 147, 11 S.Ct. 54, 34 L.Ed. 636 (1890); *United States v. Harris*, 3 M.J. 627 (N.C.M.R. 1977).

The second aspect of appellant's jurisdiction argument relates to action by Government authorities after his entry upon active duty. Appellant asserts that improper steps by Government officials after notice of his enlistment impediment estops the Government from relying on a theory of constructive enlistment, citing *United States v. Brown*, 23 U.S.C.M.A. 162, 49 C.M.R. 778 (1974) and *United States v. Marshall*, 3 M.J. 612 (N.C.M.R. 1977).

Appellant testified at trial that he informed authorities during recruit training that he was on probation from a civilian conviction. As a result, appellant was processed for an administrative discharge pursuant to the Marine Corps Separation and Retirement Manual, MCO P1900.16. At his request, the discharge was suspended to give him the opportunity of remaining in the Marine Corps. He now asserts that authorities failed to follow their own regulation requiring processing for an honorable discharge instead of the general discharge he was processed for and that such failure, whether by intent or through negligence, constitutes misconduct that forecloses the Government from claiming a constructive enlistment. We reject this line of argument for several reasons. First, Paragraph 6018 of MCO P1900.16 does not make an honorable discharge mandatory. It states:

> 1. The Commandant of the Marine Corps and all Marine commanders exercising general-court martial jurisdiction may authorize or direct . . . the discharge of members by reason of misconduct. . . .
>
> * * * * * *
>
> (d) If discharge is deemed proper in these cases, *it should normally be under honorable conditions*, unless the particular circumstances of the case clearly warrant a less favorable type of discharge. [Emphasis added].

Second, since we have determined that appellant's initial enlistment was voidable at the option of the Government, rather than void, the concept of constructive enlistment does not apply. The most common situation in which the constructive enlistment doctrine pertains is the under-

age enlistment. Enlistments below the minimum statutory age are void and mandate discharge if discovered by authorities before the legal age of enlistment is reached. *United States v. Blanton*, 7 U.S.C.M.A. 664, 23 C.M.R. 128 (1957). After attaining that age, however, the concept of constructive enlistment applies, contingent upon subsequent voluntary service and acceptance of benefits. *United States v. Graham*, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972); *United States v. Overton*, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958).

Under certain circumstances, however, the Government may be estopped from asserting constructive enlistment. Such was so in *United States v. Brown*, *supra*, where the inaction of a company commander, upon notification that one of his men was underage, was combined with the recruiter's failure to properly witness a parental consent form, thus prompting the court to deny the Government's assertion of constructive enlistment. In *Marshall*, *supra*, another panel of this Court entended the holding in *Brown* to encompass a situation involving enlistment with concealment of prior marijuana usage, a then non-waivable ground for enlistment disqualification.

In *Marshall*, the accused revealed his prior use of marijuana to a clerk in the Recruit Training Regiment. The clerk entered the information on the accused's Personal History form, but nothing further was done. The court in *Marshall* held that there was no jurisdiction because the Government had an affirmative duty to discharge the accused and failing in his duty could not invoke a theory of constructive enlistment. Appellant asserts that the same result should follow in the instant case. As already pointed out, the concept of constructive enlistment is inapplicable to the present fact situation where the enlistment is voidable rather than void. In our view, it was also inapplicable in *Marshall*. Furthermore, the Marine regulation encountered here is the same as that in *Marshall* and it does not mandate discharge. Accordingly, failure to discharge the accused—or as argued here—to process him for an honorable discharge, was not improper and certainly not misconduct that would foreclose invoking the constructive

enlistment doctrine, were it applicable. Accordingly, we reject both arguments by appellant with regard to jurisdiction and decline to accept the views expressed in *United States v. Marshall, supra.*

II

Speedy Trial

Appellant asserts for the first time before this Court that he was denied a speedy trial. We deem this issue to have been affirmatively waived by appellant at trial and correctly so for there is no merit in the assertion. He was released from pretrial confinement on 13 May 1976, after 85 days incarceration, thus falling short of the ninety days required to trigger the rule in *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), which would mandate dismissal. The first Article 39(a) session was held five days later on 18 May 1976. Thereafter, all further delays were at defense's behest. Accordingly, were the matter not waived, we would deny this assignment for the reason that the delay from 18 May 1976 to 15 September 1976 was defense induced.

III

Sufficiency of the Evidence

Appellant testified at trial that when his absence commenced on 7 November 1974, he thought he had authority to leave because a sergeant, who was Administrative Chief, told appellant to go home and that he would send his discharge with pay that was due him, after paperwork had been completed. Appellant argues that his belief that he was authorized to leave was both an honest and reasonable mistake; therefore, a complete defense to the alleged unauthorized absence. A mistake of fact may be a defense to the general intent offense of unauthorized absence if it is both honest and reasonable. *United States v. Scheunemann*, 14 U.S.C.M.A. 479, 34 C.M.R. 259 (1964); *United States v. Holder*, 7 U.S.C.M.A. 213, 22 C.M.R. 3 (1956). The Government offered no evidence to

rebut the testimony of appellant, relying instead on that very same testimony to demonstrate that appellant's belief was not honest and reasonable.

Appellant's unrebutted testimony was that he had been told that his suspended general discharge was to be executed and that he had been left at Camp Lejeune for that purpose while the remainder of his unit had gone to California for training. After regularly inquiring about the status of his discharge, and pay which had been sent to California, he was finally told by the Administrative Chief to go home and await the receipt of his discharge and pay. According to appellant he got his gear together, stopped by the administrative office to tell the sergeant he was leaving, and then went home as directed. After a period of time when nothing was received, he started making inquiries and at about the tenth month of his absence, called the Marine Corps in Washington, D.C. and found out that he was considered an unauthorized absentee. (R. 111).

Paragraph 214, MCM, 1969 (Rev.) discusses special or affirmative defenses, such as mistake of fact, and in so doing states:

> The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the Government, both with respect to those elements of the offense which must be established in every case and with respect to issues involving special defenses which are raised by the evidence.

In our view, the Government has not satisfied this burden with respect to the commencement of the absence on 7 November 1974. We are not convinced beyond a reasonable doubt that appellant's belief that he had authority to go home was neither reasonable nor honest. However, at some point when appellant failed to receive his pay and a discharge as promised, his continued belief that his absence was authorized was unreasonable. Certainly, by the time he was informed ten months later, by 6 September 1975, that he was an unauthorized absentee, he was then fully aware that continued absence would be without

authority and that he had a duty to return. Accordingly, the evidence of record convinces us beyond a reasonable doubt that appellant is guilty of the lesser included period of unauthorized absence from 6 September 1975 to 18 February 1976. *See United States v. Harris*, 21 U.S.C.M.A. 590, 45 C.M.R. 364 (1972) with regard to establishment of a different inception date of unauthorized absence. We will reassess the sentence in light of the lesser offense.

Only so much of the findings of guilty approved below as finds that the appellant absented himself without proper authority from 6 September 1975 until 18 February 1976 is affirmed. After reassessment, only so much of the sentences approved below as provides for a bad conduct discharge, suspended for one year, confinement at hard labor for two months, and forfeitures of $200 per month for two months is affirmed.

Chief Judge CEDARBURG concurs.

GREGORY, Judge (concurring):

The principal opinion declines to follow the reasoning of *United States v. Marshall*, 3 M.J. 612 (N.C.M.R. 1977), a decision in which I concurred. The factual situation in *Marshall* is quite similar to that existing in the instant case in that a defect which would have precluded enlistment as discovered by an agent of the Government early in the appellant's recruit training. The only significant difference appears to be that in *Marshall* the Government agent receiving the information failed to take appropriate action and steps were never commenced toward possible administrative separation of the service member.

Upon further consideration of the basic issue found in both *Marshall* and this case, I conclude that, in the absence of recruiter misconduct, the enlistments in these cases should be viewed not as void but rather as voidable at the option of the Government. For this reason, I must agree that my previous views in *Marshall* were incorrect.

I concur in the resolution of the remaining assignments of error and join in the disposition directed by the principal opinion.

Supreme Court, U.S.
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No. 92-1473

In The

Supreme Court of the United States

October Term, 1992

CLIFFORD LAUNIUS,

Petitioner,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF DES PLAINES, ILLINOIS; PAUL JUNG, Chairman, HERMAN HERZOG and WILLIAM J. CONNOLLY, Members of the Board of Fire and Police Commissioners; and JOSEPH KOZENCZAK, Chief of Police of the City of Des Plaines, Illinois,

Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to consider the issues presented in the Petition even though the Petitioner failed to raise any federal question before the state court at any time prior to filing a petition for rehearing before the highest state court?

II. Are there "special and important reasons" for granting certiorari to determine whether it is constitutionally permissible for a board of fire and police commissioners to discharge a police officer who was guilty of eight different infractions?

III. Should this Court grant certiorari to determine whether, in order to satisfy the Constitution's equal protection guarantees, a board of fire and police commissioners must impose the same punishments on one police officer who was guilty of one infraction and another officer who was guilty of eight different infractions?

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OPINIONS BELOW

The Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, ordered Launius' discharge on May 25, 1988, finding that Launius had committed numerous infractions warranting his dismissal from the police force. The Circuit Court

of Cook County, Illinois, Sophia H. Hall, J., affirmed the decision of the Board in an administrative review action on August 30, 1989, holding that the Board's decision was not against the manifest weight of the evidence.

The Illinois Appellate Court for the First District reversed the circuit court's decision in a 2-1 decision, remanding the case to the Board for consideration of a less severe penalty, after according different weight to the evidence before the Board. The Respondents filed a petition for leave to appeal to the Illinois Supreme Court, which was granted on October 2, 1991.

On September 24, 1992, the Illinois Supreme Court reversed the decision of the appellate court, finding that the appellate court had exceeded its role in the administrative review process by reweighing the evidence. Following the adverse decision, Launius filed a petition for rehearing before the Illinois Supreme Court, alleging for the first time that his federal constitutional rights had been violated. On November 30, 1992, the Illinois Supreme Court denied rehearing summarily, ordering the mandate to issue on December 10, 1992.

OBJECTIONS TO JURISDICTION

The Court should decline review because the Petitioner failed to raise the federal questions advanced in his Petition for Writ of Certiorari before the state courts.

STATEMENT OF THE CASE

This case involves the administrative review of a decision rendered by the Board of Fire and Police Commissioners[1] of the City of Des Plaines, Illinois, in a disciplinary proceeding. The

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1. Paul Jung succeeded the late A.W. Wilson as a member of the Board of Fire and Police Commissioners. He is named herein pursuant to Rule 35.3.

facts presented before the Board were essentially undisputed and are set forth in detail in the reported decisions below. The evidence adduced before the Board was that Officer Clifford Launius was assigned to work the second watch (7:00 a.m. to 3:00 p.m.) at the Des Plaines Police Department, on August 14, 1987. He was assigned desk duty, answering calls from citizens who were calling in for information and assistance relative to the flooding which was taking place throughout the City.

Shortly after beginning his shift, Launius exchanged a number of calls with his wife regarding a potential flooding problem in the basement at their home in Wheeling, Illinois, approximately eight miles from Des Plaines. Mrs. Launius called Launius at work to inform him that water was accumulating in the basement through seepage in the foundation. Launius informed his superior officer, Lieutenant Diehl, that he was in contact with his wife and that he might have to leave. Lieutenant Diehl denied Launius' request to leave his assigned post. Shortly thereafter, Launius again asked Lieutenant Diehl for permission to leave, and was again denied permission to do so. At approximately 10:10 a.m., Launius walked out of the desk area in derogation of Lieutenant Diehl's express directives to the contrary, and without securing a replacement for his position, and left the Des Plaines police station.

Lieutenant Diehl stated that, at the time Launius left, people were calling the police for help and that there were no squad cars available to answer calls. Further, electric power was failing in Des Plaines and alarms were going off throughout the City, but officers could not respond to the calls. Due to the lack of operational telephone facilities, officers on the street were directed to proceed to the homes of other police officers who lived in the City to tell them to come into the police station and report for duty.

Shortly after 11:00 a.m., Launius arrived home and discovered minimal damage. Instead of returning to the police

station. Launius began checking on his neighbors to see if he could assist them with their flooding problems. Launius spent the remainder of the morning and the afternoon hauling sand bags and stacking them around his townhome and those of his neighbors.

Launius had no contact with the Des Plaines Police Department until approximately 9:30 p.m. that evening when another officer called to inform him of the 12-hour shifts at the police station. Lieutenant Storm, the watch commander that evening, informed Launius that he was on emergency suspension with pay.

As a result of the storm, the City of Des Plaines received more than nine (9) inches of rain, experiencing the worst flooding in the history of the City. Former Illinois Governor, James Thompson, declared the county in which Des Plaines is located to be a disaster area. The flooding of August 14, 1987 affected approximately 7,000 homes and 200 businesses. Further, about 50% of the streets in the City of Des Plaines, including many of its major arterial and feeder streets, were totally blocked. The City's Emergency Traffic Plan went into effect sometime between 7:30 a.m. and 7:45 a.m.

Thirty-three Des Plaines police officers experienced flooding or water in their homes as a result of the rains. The only officer who left his post due to the flooding in his home was Launius. Numerous officers testified at the hearings that they sustained extensive damage and reported to duty, even though in some instances it required abandoning their damaged homes, spouses and children. Launius admitted that he realized that he acted improperly when he abandoned his duty station.

Another officer was also disciplined by Des Plaines Chief of Police, Joseph Kozenczak, as a result of events that transpired

during the flooding. Although not scheduled to work, Officer Richard Czyzewski was called by Sergeant Neil and told to report to duty. Officer Czyzewski swore at Sergeant Neil and explained that he was not coming in because his streets were impassable. Officer Czyzewski was suspended for four days for "insubordination".

The Chief of Police filed charges against Launius for his actions. The Board of Fire and Police Commissioners found Launius guilty of the charges of "unbecoming conduct"; "breach of performance of duty" in refusing to perform his duties as a police officer; "breach of duty responsibilities", because he failed to respond to his superior officer's orders denying him the request to go home; violating the rules regarding "relief", because Launius left his assigned post without being properly relieved; "absence from duty"; and "insubordination" for deliberately disobeying a lawful order of a superior.

As the penalty for these infractions, the Board dismissed Launius from the police force. Launius filed an action seeking administrative review of that decision, bringing into issue the limited question of whether the Board's ruling was against the manifest weight of the evidence. The Circuit Court of Cook County, Illinois, affirmed the decision of the Board discharging Launius. *See* App. C-1. On a 2-1 vote, the Appellate Court for the First District of Illinois reversed that decision, finding that the Board's ruling was not supported by what the appellate court determined to be the manifest weight of the evidence and the case was remanded to the Board for consideration of a less onerous penalty. *See* App. D-1. The Board filed a petition for leave to appeal to the Illinois Supreme Court, which was allowed on October 2, 1991.

On September 24, 1992, the Illinois Supreme Court reversed the decision of the appellate court, holding that the appellate court

exceeded its authority in an administrative action by reweighing the evidence before the Board. *See* App. A-1. The Illinois Supreme Court further ruled that the Board's factual finding that Launius abandoned his post during an emergency was not contrary to the manifest weight of the evidence, and that Launius' discharge was not arbitrary or unreasonable.

Launius subsequently filed a petition for rehearing in the Illinois Supreme Court, alleging for the first time that certain rights afforded him by the Declaration of Independence, the Fifth Amendment, and the Fourteenth Amendment, were violated by the Illinois Supreme Court in rendering its opinion. *See* App. E-1. The Illinois Supreme Court summarily denied the petition for rehearing on November 30, 1992. *See* App. B-1.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DECLINE TO CONSIDER THE QUESTIONS ADVANCED BY LAUNIUS BECAUSE THEY WERE RAISED FOR THE FIRST TIME FOLLOWING FINAL JUDGMENT OF THE ILLINOIS SUPREME COURT.

Launius attempts to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a) (1992). However, numerous cases have held that this Court has no jurisdiction to exercise its appellate power over state court judgments, under section 1257 or its predecessor sections, unless a federal question has been raised in the state court below, or considered and resolved by the state court. *See, e.g., McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940); *Hill v. California,* 401 U.S. 797, 805 (1971). Because Launius failed to timely present any federal questions before any state court, the courts did not consider or resolve any federal questions.

Consequently, this Court should decline to exercise jurisdiction to consider the purported federal questions which were manufactured by Launius for the first time after the ruling of the Illinois Supreme Court from which appeal is sought.

Specifically, section 1257 requires that the validity of a federal right or privilege be "drawn into question" or "specially set up or claimed." 28 U.S.C. § 1257(a) (1992). The proper manner of raising a federal question depends on the particular state practice. *See Central Union Telephone Co. v. City of Edwardsville,* 269 U.S. 190, 194-95 (1925); *Pennsylvania R. Co. v. Illinois Brick Co.,* 297 U.S. 447, 462-63 (1936), *reh'g denied,* 297 U.S. 728 (1936); *Parker v. Illinois,* 333 U.S. 571, 574-75 (1948), *reh'g denied,* 334 U.S. 813, *pet. denied,* 335 U.S. 856 (1947); *Michel v. Louisiana,* 350 U.S. 91, 93 (1955), *reh'g denied,* 350 U.S. 955. As Justice Harlan stated in his dissent in *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, 334 (1968), in determining whether a question was "specially set up or claimed" within the meaning of a predecessor of section 1257(a), "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing the presentation of issues." 391 U.S. 308, 334 (1968) (Harlan, J., dissenting).

It is insufficient to raise a federal question for the first time in a petition for rehearing directed to the highest state court. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958), *reh'g denied,* 358 U.S. 858 (1957); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935), *reh'g denied,* 296 U.S. 661 (1934); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932); *Forbes v. State Council of Virginia,* 216 U.S. 396 (1910); *Simmerman v. Nebraska,* 116 U.S. 54 (1885). In such a circumstance, a judgment will only be considered reviewable in the limited instances when the order denying rehearing goes beyond a cursory recitation and indicates that the federal question was considered and decided. *See Consolidated Turnpike Co. v.*

Norfolk and O.V.R. Co., 228 U.S. 326, 333-34 (1913), *reh'g denied*, 228 U.S. 596 (1913); *Forbes v. State Council of Virginia*, 216 U.S. 396, 399 (1910); *McCorquodale v. Texas*, 211 U.S. 432, 436-37 (1908).

The important policy considerations behind this jurisdictional requirement have long been recognized, initially in interpretations rendered regarding section 25 of the Judiciary Act of 1789, the linear ancestor of section 1257. *See* cases discussed by Justice Story in *Crowell v. Randell*, 10 Pet. 368, 391-98 (1836). Some of these policy considerations were succinctly summarized in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) as follows:

1. If a federal question was not raised before the state court, the "record is very likely to be inadequate, since it certainly was not compiled with those questions in mind";

2. In a federal system, "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality"; and

3. If properly raised below, the federal question might "be blocked" by the state court on an adequate and independent state ground, thereby rendering unnecessary any Supreme Court review of the federal issue.

See also, Illinois v. Gates, 462 U.S. 213, 218-20 (1983), *reh'g denied*, 463 U.S. 1237 (1983).

These policies are consistent with this Court's repeated acknowledgments that the state courts are competent to adjudiciate

federal constitutional claims. *See, e.g., Allen v. McCurry,* 449 U.S. 90, 105 (1980).

In the case *sub judice,* Launius' arguments before the circuit court, appellate court, and supreme court consistently advocated and defended the following positions:

1. The Board's findings were against the manifest weight of the evidence;

2. Launius did not receive a fair and impartial hearing;

3. The punishment imposed by the Board was arbitrary, and capricious; and

4. The Board was not uniform in disciplining officers guilty of different infractions.

The issues surrounding these allegations were fully briefed by all parties, and several amici, and were addressed by all three divisions of the state's judiciary. After receiving an adverse ruling from the Illinois Supreme Court, Launius filed a petition for rehearing alleging, for the first time, that his federal constitutional guarantees had been violated.

In an attempt to fashion an argument sufficiently attractive to draw this Court's attention, Launius' petition for rehearing averred that the Illinois Supreme Court's "decision constitutes a denial of due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution," that the court "improperly applie[d] [a] duress principle resulting in a denial of the due process clause;" and that "the court's decision denies equal protection under the Fifth and Fourteenth Amendments." Because the Illinois Supreme Court's ruling affirmed the actions of the Board and the ruling of the circuit court, it was not unexpected or

surprising. If the mere rendering of an opinion by the state's highest court violates federal constitutional guarantees, every litigant, like Launius, who fails to raise a federal question prior to a highest state court's ruling on the merits will be afforded the opportunity to avail themselves to potential relief from this Court after an adverse ruling by the state's highest tribunal.

If, contrary to the language of his petition for rehearing, Launius' true complaint in his petition for rehearing is that the Illinois Supreme Court failed to consider certain federal constitutional guarantees that were allegedly violated by the action of the Board of Fire and Police Commissioners, the blame falls squarely upon Launius for failing to bring these issues before the court for consideration. As one commentator admonishes:

> [I]f you are about to commence litigation [in state court] in which there may be involved, then or ultimately, a question arising under the constitution or laws of the United States, you must raise the federal question at the outset and not as an after thought after you have lost below. By that time you are almost always too late * * * unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you do not have any chance of it at all.

F. Wiener, *Wanna Make a Federal Case Out Of It?* 48 A.B.A.J. 57, 60, 62 (1962) (italicization original.)

The record that the Court is being asked to consider is wholly devoid of any references to federal constitutional issues. It is clear from a review of the trial, appellate, and supreme court opinions that no federal questions were posed, nor were any considered or

decided by any state court. Now, five years after the Board's actions purportedly giving rise to a federal question, Launius alleges the existence of federal constitutional issues for the first time. Because Launius failed to advocate this issue at any previous stage, the Court should decline to consider his new claims and deny certiorari.

II.

THE PETITIONER HAS PRESENTED NO "SPECIAL" OR "IMPORTANT" REASON FOR THIS COURT TO REVIEW THE ILLINOIS SUPREME COURT'S DECISION.

Supreme Court Rule 10 establishes that a review on a writ of certiorari is not a matter of right, but a matter of judicial discretion. Rule 10 provides that "a writ of certiorari will be granted only when there are special and important reasons therefor." Because the Petitioner seeks the review of a state supreme court decision, this Court must consider whether the Illinois Supreme Court has, in the case *sub judice*, decided a federal question in a manner conflicting with a decision of another state court of last resort or of a United States court of appeals, or whether the Illinois Supreme Court's decision in this case involves an important question of federal law which should be settled by this Court, or which was decided in a manner conflicting with other applicable decisions of this Court.

The Illinois Supreme Court's decision in this case in not in conflict with a decision of another state court of last resort, a decision of a United States court of appeals, or a decision of this Court, nor does it involve an important question of federal law. Launius does not allege that it does. *See* Petition for Writ of Certiorari, generally. To the extent that the issues at bar involve due process or equal protection guarantees, the requirements of the due process and equal protection clauses have been well settled by this

Court and the decision of the Illinois Supreme Court is in accord with those requirements. Further, because the Illinois courts were not presented with any purported federal questions, such issues were not addressed by either the state court litigants, amici, or the courts.

In addition, it is significant to note that Launius does not even allege that "special" or "important" reasons exist that would warrant review by this Court. In his first argument in his Petition, Launius' argument centers around an allegation that the Illinois Supreme Court's decision was interpreted "as standing for the proposition that one's duty to government is more paramount than one's duty to family" by a local newspaper. *See* Petition for Writ of Certiorari at p. 11. "Duty to government" was never an issue before any of the lower courts. Instead, the narrow inquiry considered by the reviewing court was limited to whether the original administrative ruling was supported by the manifest weight of the evidence. Further, Launius' argument that "the Illinois Supreme Court has circumvented natural law", (*see* Petition for Writ of Certiorari at p. 17), while unique, is not supported by the record, which was determined in accordance with the well settled principles of administrative review law. Because Launius has failed to identify any special or important reasons for this Court to grant certiorari, the Court should decline to do so.

III.

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT OFFICERS GUILTY OF DIFFERENT OFFENSES MUST RECEIVE EQUAL DISCIPLINE.

For his second argument urging this Court to grant certiorari, Launius contends that his equal protection rights were violated because he received a different sanction as a result of his eight different infractions than another officer received for one

infraction. *See* Petition for Writ of Certiorari, p. 18. In determining whether a complainant has been denied "due process of law" and the "equal protection of laws" by an administrative body such as the Board, the appropriate inquiry is whether the administrative tribunal acted contrary to the applicable statutes and rules and with arbitrary discrimination. *See Howard Sports Daily v. Weller*, 18 A.2d 210, 179 Md. 355 (1941). The discretion conferred upon an administrative body must be exercised on a reasonable or rational basis, and must not be used in a discriminatory manner to survive a challenge that its actions were arbitrary. *See Hennessey v. Independent School Dist. No. 4, Lincoln County, Okl.*, 552 P.2d 1141 (1976).

While Launius did not raise an equal protection issue before the lower courts, the courts did consider whether the Board's actions were arbitrary and unreasonable because the issue of the Board's action was raised before the state courts in a different context. The Illinois Supreme Court noted that, "An administrative tribunal's finding of "cause" for discharge may be considered arbitrary and unreasonable when it is compared to the discipline imposed in a completely related case," citing *Wilson v. Board of Fire and Police Commissioners,* 205 Ill. App. 3d 984, 992, 563 N.E. 2d 941 (1990). The court also recognized that "cause for discharge can be found regardless of whether other employees have been disciplined differently", citing *Lyles v. Department of Transportation,* 183 Ill. App. 3d 901, 911-12, 539 N.E. 2d 833 (1989), *appeal denied,* 127 Ill. 2d 619 (1989), a case in which the court did not find the discharge of an employee to be arbitrary where facts surrounding the charges of other employees precluded a meaningful comparison to the discharge at issue.

Launius maintains that he should have received a penalty similar to the four-day suspension received by an officer who, in a profane manner, disobeyed an order to report for duty. The Illinois Supreme Court, in its analysis, details the litany of misdeeds committed by Launius, concluding that:

> A police officer does not have the option of performing his duties when he wishes. [Launius] admitted that as a police officer, it was his primary and sworn duty to protect the lives and property of the citizens of Des Plaines. The board found, *inter alia*, that [Launius] abandoned his post, that he "refused to perform his duties as a police officer," that he "demonstrated a substantial shortcoming which render[ed] continuance in employment in some way detrimental to the discipline and efficiency of the Police Department"; and consequently, the board ordered that [Launius] be discharged from his position as a police officer. This decision was neither unrelated to the needs of the service nor arbitrary and unreasonable.

Launius v. Board of Fire and Police Commissioners of the City of Des Plaines, 151 Ill. 2d 419, 603 N.E. 2d 477 (1992), *reh'g denied*, __ Ill. 2d __ (1993).

Because the Board possessed the discretion to impose different punishments for the varying infractions committed by the two officers, it imposed a stricter penalty against the officer who was guilty of eight infractions. This was well within the Board's discretion and consistent with the equal protection guarantees conferred by the Constitution. Accordingly, there is no equal protection issue at bar which would require review by this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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